# DOCKET

No. 86-1940-CFX
Status: GRANTED

Title: Sheet Metal Workers' International Association, et al., Petitioners
v.
Edward Lynn

Docketed:
June 4, 1987

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Fisher,Donald W.

Counsel for respondent: Stark,Bruce M., Levy,Paul Alan

NOTE: 4/17/87 ext. until 6/4/87 by O'Connor, J., cited

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 16 1987 | | Application for extension of time to file petition and order granting same until June 4, 1987 (O'Connor, April 17, 1987). |
| 2 | Jun 4 1987 | G | Petition for writ of certiorari filed. |
| 3 | Jun 22 1987 | | Brief of respondent Edward Lynn in opposition filed. |
| 4 | Jun 23 1987 | | DISTRIBUTED. September 28, 1987 |
| 5 | Sep 1 1987 | X | Reply brief of petitioner Sheet Metal Workers' Intl. filed. |
| 6 | Oct 5 1987 | P | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| 7 | Feb 10 1988 | | Brief amicus curiae of United States filed. |
| 8 | Feb 17 1988 | | REDISTRIBUTED. March 4, 1988 |
| 10 | Mar 8 1988 | | REDISTRIBUTED. March 18, 1988 |
| 11 | Mar 21 1988 | | Petition GRANTED. Justice Kennedy OUT. |
| | | | ********** |
| 13 | May 2 1988 | | Order extending time to file brief of petitioner on the merits until May 26, 1988. |
| 14 | May 25 1988 | | Record filed. |
| | | * | Certified copy of original record and proceedings, 3 volumes, received. |
| 15 | May 26 1988 | | Joint appendix filed. |
| 16 | May 26 1988 | | Brief of petitioners Sheet Metal Workers' Intl. Assn., et al. filed. |
| 18 | Jun 8 1988 | D | Motion of respondent to dismiss writ of certiorari as improvidently granted filed. |
| 20 | Jun 9 1988 | | Order extending time to file brief of respondent on the merits until July 29, 1988. |
| 21 | Jun 16 1988 | | Brief of petitioners in response to respondent's motion to dismiss the writ of certiorari as improvidently granted filed. |
| 22 | Jun 17 1988 | | DISTRIBUTED. June 23, 1988. (Motion of respondent to dismiss writ of certiorari as improvidently granted). |
| 23 | Jun 27 1988 | | Motion of respondent to dismiss writ of certiorari as improvidently granted DENIED. Justice Kennedy OUT. |
| 25 | Jul 29 1988 | | Order extending time to file brief of respondent on the merits until August 2, 1988. |
| 26 | Aug 2 1988 | | Brief of respondent Edward Lynn filed. |
| 27 | Aug 10 1988 | | CIRCULATED. |
| 28 | Aug 29 1988 | | Set for argument. Monday, November 7, 1988. (4th case) |

No. 86-1940-CFX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| | | | (1 hr). |
| 29 | Sep 1 1988 | X | Reply brief of petitioner Sheet Metal Workers' Intl. filed. |
| 32 | Nov 7 1988 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

86 1940

No. ——



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether the rule set out in *Finnegan v. Leu*, 456 U.S. 431 (1982), delineating the Landrum-Griffin Act's scope of application to the removal from union office of a union member who holds that office: (i) governs, as the Ninth Circuit has held, only the removal of appointed union officers and not elected officers (even where subsequent to its elections, a local union has been placed in trusteeship and the elected local union officer who is removed is serving at the trustee's will); (ii) governs, as the Fifth Circuit has held, the removal of both appointed and elected officers; or (iii) governs, as the Eleventh Circuit has held, the removal of appointed officers and the removal of elected officers in response to those officials' "officer speech"?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. ———

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioners Sheet Metal Workers' International Association, AFL-CIO, and Local 75 of the Sheet Metal Workers' International Association, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this matter dated November 26, 1986 and reported at 804 F.2d 1472.

## CITATIONS TO THE OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit in this matter are reported at 804 F.2d 1472 and are reproduced in Appendix A, pp. 1a-27a, *infra*. The Ninth Circuit's order denying petitioners' motion for reconsidera-

tion and suggestion for reconsideration *en banc* is unreported and is reproduced in Appendix B, p. 28a, *infra*. The United States District Court for the Central District of California's order and partial summary judgment dated April 3, 1984, is unreported and is reproduced in Appendix C, pp. 29a-30a, *infra*. The district court's statement of uncontroverted facts and conclusions of law supporting that order is unreported and is reproduced in Appendix D, pp. 31a-36a, *infra*.

## JURISDICTION

The decision of the Court of Appeals was entered on November 26, 1986. Petitioners' motion for reconsideration and suggestion for reconsideration *en banc* was denied in an order entered on February 4, 1987.

On April 17, 1987 Justice O'Connor entered an order granting petitioners an extension of time to and including June 4, 1987 for filing a petition for a writ of certiorari herein.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix E, pp. 37a-38a, *infra*.

## STATEMENT OF THE CASE

The Constitution of the Sheet Metal Workers' International Association (the International) provides that a local union business representative is an official who assists the local union's chief executive officer—its business manager—by performing a variety of activities in the field such as processing grievances, organizing unorganized workers, and discharging such other functions as are assigned by the business manager.

This case concerns respondent Edward Lynn (Lynn), who was elected in June of 1981 as one of 2 business



representatives of Sheet Metal Workers' Local 75 (Local 75). (App. D, p. 32a.)

In 1982, the financial condition of Local 75 had become so critically depressed that on June 12, Local 75's officers—including its business manager, and both of its business representatives—signed and sent a letter to the General President of the International recommending that the local union be placed under International trusteeship. The General President thereafter placed Local 75 under trusteeship and appointed Richard Hawkins (Hawkins) as International trustee. (App. D, p. 33a.) (The propriety of the imposition of the trusteeship over Local 75 was not challenged by Lynn—who was, after all, one of the persons requesting the action—in the proceedings below.)

International trustee Hawkins was delegated authority under Article Three, Section 2(c) of the International's Constitution

> to take such action as he deems necessary to protect the interest and welfare of Local 75, its funds, property and membership and the interest and welfare of the International Association [including] but . . . not limited to the right to suspend local union officers, the Business Manager, and/or the Business Representatives, to fill vacancies in such positions, or offices by appointment or special election or to leave such positions vacant . . . [App. D, p. 33a.]

The most urgent need of Local 75, as International trustee Hawkins saw it, was to obtain increases in the local union's monthly membership dues and initiation fees. He prepared an economic proposal which was submitted to and approved by the members of the Local 75 Executive Board and scheduled for a secret-ballot vote of the membership on July 24, 1982. Hawkins advised the Local 75 officers including the business representatives that he expected them to support his recommendations. (App. D, pp. 33a-34a.)

Lynn, however, refused to endorse these measures, and, at the special meeting on July 24, along with some rank-and-file members, he spoke at length against the proposed increases, after which the trustee's economic proposals were defeated. Lynn openly claimed credit for being at least partially responsible for the negative result. (App. D, p. 34a.)

Five days later, on July 29, 1982, Hawkins notified Lynn that he was exercising his authority as International trustee "to remove you from the office indefinitely" because of "various actions you have taken which are detrimental to the International Association and Local Union #75 and your refusal to support the officers of Local Union #75 in their efforts [to obtain the dues increase on July 24, 1982]." (App. D, p. 34a.) Lynn's membership rights in Local 75 were unaffected by his removal from office. (App. D, p. 36a.)

Lynn filed internal union appeals protesting his removal as business representative which were denied at every appellate level. (App. D, p. 34a.) He then filed suit in the district court under § 102 of the Labor Management Reporting and Disclosure Act of 1959 (the Landrum Griffin Act), 29 U.S.C. § 412, alleging in the First Clause of Action that his removal from office violated his rights under §§ 101(a)(1), 101(a)(2), and 609 thereof. 29 U.S.C. §§ 411(a)(1), 411(a)(2), and 529.

The International and Lynn each moved for partial summary judgment on the First Cause of Action. The district court entered summary judgment in favor of the International relying principally on this Court's decision in *Finnegan v. Leu*, 456 U.S. 431 (1982). (App. C, pp. 29a-30a; App. D, pp. 35a-36a.)

On appeal, a panel of the Ninth Circuit in a 2 to 1 decision reversed the district court's entry of summary judgment in favor of the International. The panel majority stated in part:



> Here, it is clear that Lynn's removal was precipitated by his outspoken opposition to the proposed dues increase, a position which also reflected the views of the majority of the union membership. This is not a case involving a union patronage system; rather, it concerns an elected officer who is speaking not only for himself as a member, but also as a representative of those members who elected him. We hold that, under these circumstances, Lynn alleged a cause of action under section 102. [App. A, p. 11a; footnotes omitted.]

Judge Kennedy, the dissenting panel member, stated:

> I submit with all respect, however, that the majority errs in holding that union leadership cannot discharge a business manager who actively opposes the leadership on a fundamental issue of union policy. The majority reaches this conclusion only by what I conclude is a misreading of the Supreme Court's opinion in *Finnegan v. Leu*, 456 U.S. 431 (1982). The majority's error is compounded by the creation of an unwarranted conflict with the two other circuits that have addressed the point. I dissent from the court's holding on this critical aspect of the case, set out in Part I of its opinion. [App. A, p. 24a.]

## REASONS FOR GRANTING THE WRIT

The decision below, which treats with a basic and recurring question arising under the Landrum-Griffin Act, creates a three-way conflict in the circuits and is, on its own terms, impossible to reconcile with this Court's decision in *Finnegan v. Leu*, 456 U.S. 431 (1982). This is a case that, on all these grounds, calls for this Court's plenary consideration.

1.(a) Over the years the lower courts have disagreed as to whether the Landrum-Griffin Act insulates a union member who holds a union position against removal from that position in the manner provided for in the union's

constitution and bylaws. That question goes to the heart of how unions govern themselves and the extent to which the membership is free to adopt rules to assure that union officials faithfully and effectively carry out their assigned duties. In *Finnegan v. Leu*, this Court—recognizing that the issue is one of large moment—settled one aspect of this perennial problem.

The *Finnegan* Court held: that "removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609 [of the Landrum-Griffin Act]," 456 U.S. at 439; and that "whatever limits Title I [of the Landrum-Griffin Act] places on a union's authority to utilize dismissal from union office as 'part of a purposeful and deliberate attempt . . . to suppress dissent within the union,' *cf. Schonfeld v. Penza*, 477 F.2d 899, 904 (C.A. 2 1973), it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own," 456 U.S. at 441.

In the five years since *Finnegan* was decided, numerous district courts and four of the courts of appeals have grappled with the question of whether the Landrum-Griffin Act affords *elected* union officers a greater measure of tenure protection than *appointed* union officers; as a result, a new three-way conflict in the circuits has been generated.

The Ninth Circuit, as already noted, held in this case that

> . . . it is clear that Lynn's removal was precipitated by his outspoken opposition to the proposed dues increase, a position which also reflected the views of the majority of the union membership. This is not a case involving a union patronage system; rather, it concerns an elected officer who is speaking not only for himself as a member, but also as a representative of those members who elected him. We hold that, under these circumstances, Lynn alleged a cause of action under section 102. [App. A, p. 11a; footnotes omitted.]



That approach, as Judge Kennedy emphasizes in his dissent, App. A, pp. 25a-26a, is exactly contrary to the one taken by the Fifth Circuit in *Adams-Lundy v. Ass'n of Prof. Flight Attendants*, 731 F.2d 1154 (C.A. 5, 1984) (*Adams-Lundy I*). The Fifth Circuit has recognized that "under ordinary circumstances, the shuffling of positions caused by political in-fighting or factionalism within a union implicates no rights safeguarded by the LMRDA." *Id.* at 1158. For that reason, an elected officer who is removed from his position, like an appointed officer, has a valid Title I claim *only* if "his firing was part of a pattern of intimidation and stifled dissent." *Id.* at 1159. In sum, said that court:

> The question ultimately confronting us is whether elected officers are afforded broader protection under § 102 than are appointed officers. We conclude that the fact that the removed officer was elected by the membership will not suffice to create jurisdiction under the LMRDA. [731 F.2d at 1159.]

*See also* to the same effect *Adams-Lundy v. Ass'n. of Prof. Flight Attendants*, 792 F.2d 1368 (C.A. 5, 1986) (*Adams-Lundy II*).

The Eighth Circuit, in a case challenging the suspension of an elected officer only on procedural grounds (and therefore one not raising any free speech questions), has aligned itself with the Fifth Circuit's position by recognizing that, in such a case, the rule stated in *Finnegan* applies to both elected and appointed officers. *See Sullivan v. Laborers District Council*, 707 F.2d 347, 350 (C.A. 8, 1983).

The Eleventh Circuit has carved out a spot somewhere between that of the Ninth Circuit on one side and the Fifth Circuit on the other. In *Dolan v. Transport Work-*

*ers Union*, 746 F.2d 733, 744 (C.A. 11, 1984), that court announced the following rule:

> All speech by a member is, in a sense, membership speech. But when a member assumes a union office, the office can imbue the membership's speech with additional significance. Depending on the consent of the speech and the nature of the office, the officer's speech may either advance her duties of office or interfere with these duties. If the speech does either, it is no longer membership speech but has been transformed into "officer speech". In addition, officers with broad policymaking or policy enforcing powers may be considered to be "speaking for the union" on most any issue relevant to union policy. If the court determines that an officer could reasonably be perceived as speaking for the union, or if her speech affects performance of her specific duties, the protections of [29 U.S.C.] § 411(a)(2) for membership speech do not apply.
>
> . . . Faithfulness to congressional intent requires that we make this differentiation. LMRDA's legislative history, the words of the statute, and prior case precedent simply do not reveal protection under § 411(a)(2) for union officers when they speak as officers.

The majority below stated that "[w]ith all due respect, we do not adopt the Eleventh Circuit's approach . . . ." (App. A, p. 10a, n.5.)

Thus, in the Ninth Circuit, any attempt by a union's highest ranking officer to remove an elected subordinate officer because the latter has taken a public position contrary to his superior on a policy question is sufficient to support a Landrum-Griffin claim. In the Fifth Circuit (and, as we read *Sullivan*, *supra*, in the Eighth Circuit as well) such a claim is valid only if the removal is part of a "pattern of intimidation and stifled dissent." And in the Eleventh Circuit, such a claim is valid only if the elected subordinate officer's speech in question is "membership speech" rather than "officer speech" under the tests laid down by that court.



(b) The Landrum-Griffin Act is an integral part of the national labor policy; in 1959, Congress came to the conclusion that regulating internal union affairs had become necessary to further perfect the overall system of regulating labor-management relations in private industry through the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, and the Railway Labor Act, as amended, 45 U.S.C. § 151 *et. seq.*[1] And the overwhelming number of union members belong to national unions whose jurisdiction covers all 50 states. There can be no doubt that the circuit conflict just detailed creates a situation in which neither national unions nor their members know their rights or their obligations. That, we submit, cuts directly against Congress' purpose in passing the Landrum-Griffin Act and requires this Court's intervention.

2. The decision below, taken on its own terms, cannot, moreover, be reconciled with this Court's decision in *Finnegan*. Business Agent Lynn's role in Local 75's affairs and his actions that led to his suspension from office do not differ in any material respect from those of Business Agent Finnegan; nonetheless, in the face of this Court's holding that Finnegan could be removed from his office, the Ninth Circuit held that Lynn could *not* be removed. The majority below was so beguiled by the

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[1] *See, e.g., Wirtz v. Bottle Blowers Assn.*, 389 U.S. 463, 369-470 (1968), quoting § 2(a) and (b) of the Landrum-Griffin Act, 29 U.S.C. § 401(a)&(b), and 389 U.S. at 470 n.9, quoting S. Rep. No. 187, 86th Cong., 1st Sess., p. 20: "Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours and conditions of employment. . . . The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent."

labels "elected officers" and "appointed officers" as to completely lose sight of the realities.

Finnegan, a business agent of a local union who had been appointed to his position by the predecessor president, and who had vigorously campaigned for the predecessor's reelection, was summarily dismissed by the newly-elected president on the ground that the business agents appointed by his predecessor "were loyal to [his predecessor], not to him, and therefore would be unable to follow and implement his policies." 456 U.S. at 434. The union's bylaws in that case provided that "the President shall have authority to appoint, direct and discharge the Union's business agents." *Id.* In that context, this Court held that the dismissal of Business Agent Finnegan did not violate the Landrum-Griffin Act.

In this case, Business Lynn, although originally elected to office, was, at all times relevant here, serving a local union under *International trusteeship*. Under the International's Constitution, once the trusteeship was accomplished, the local officers served at the pleasure of the International trustee. The trustee's authority to "suspend local union officers" is every bit as broad as the removal authority granted the local union president in *Finnegan*. And Lynn's position, as we have noted, entailed the same responsibilities as Finnegan's; both were charged with carrying out the policies established by the union's chief officer. Finally, Finnegan was removed merely on the suspicion—albeit reasonably based—that he could not be counted on to fulfill his obligation to carry out the union president's policies, whereas Lynn was suspended only after openly seeking to defeat the trustee's policies.

In upholding the right of the union president in *Finnegan* "to choose a staff whose views are compatible with his own," this Court said: "[T]he ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." 456 U.S. at 441.



Where a valid trusteeship is declared, the "union administration's . . . mandate" is one defined by public law: "correcting corruption or financial malpractice, assuring the performance of collective-bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization," § 302 of the Landrum-Griffin Act, 29 U.S.C. § 462. The ability of a trustee to dismiss disloyal or uncooperative officials of the trusteed local union in order to eliminate with celerity the deleterious conditions that necessitated imposition of the trusteeship is absolutely critical to the execution of this mandate. This commonplace practice, *see Washington v. Laborers International Union*, 792 F.2d 94 (8th Cir. 1985); *Buffalow v. United Brotherhood of Carpenters*, 619 S.W.2d 913, 924-25 (Mo. App. 1981), has therefore been recognized as proper in regulations promulgated by the Secretary of Labor under the Landrum-Griffin Act concerning the election of union officers:

> Establishment of a valid trusteeship may have the effect of suspending the operation of the election provisions of the Act. When the autonomy otherwise available to a subordinate labor organization has been suspended consistent with the provision of Title III of the act, officers of the organization under trusteeship may be relieved of their duties and temporary officers appointed by the trustee if necessary to assist him in carrying out the purposes for which the trusteeship was established. However, when a regular election of officers or an election for purposes of terminating the trusteeship is held during the trusteeship, Title IV would apply. [29 C.F.R. § 452.15.]

And just as Congress surely never intended Title I of the Landrum-Griffin Act or § 609 of that law to stand as im-

pediments to the dismissal of recalcitrant appointed union officials, so Congress surely never intended those statutory provisions to protect elected local union officers who obstruct or subvert implementation of corrective measures proposed by duly-appointed trustees.

In sum, there is no substance whatsoever to the Ninth Circuit's effort to distinguish this case from *Finnegan*. Its decision here is flatly inconsistent with this Court's decision in that case.

## CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 84-6447

D.C. No. CV 83-7146-AWT

EDWARD LYNN,
*Plaintiff-Appellee,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding
Argued and Submitted October 10, 1985
San Francisco, California

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[Filed Nov. 26, 1986]

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OPINION

Before: BROWNING, KENNEDY, and HUG, Circuit Judges.

HUG, Circuit Judge:

Lynn filed suit against the Sheet Metal Workers' International Association ("International") claiming that his removal from his position as business representative

violated his free speech rights under the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401-531 (1982). He also sued both the International and Local 75 of the Sheet Metal Workers' International Association ("Local" or "Local 75") for an alleged failure to refer him to work as required by the collective bargaining agreement. The district court granted summary judgment for the International on the job removal claim and also for Local 75 on the work referral claim; it dismissed the work referral claim against the International for failure to prosecute. Lynn now appeals the district court's actions. We reverse in part and affirm in part.

## FACTS

In June, 1981, plaintiff-appellant Edward Lynn was elected business representative of Local 75. Over the next year, Lynn and other members became increasingly critical of expenditures by the Local's officers and organized a dissident group, which successfully campaigned to defeat proposals to raise the Local's dues. In June, 1982, Local officers, including Lynn, wrote to International's president and asked him to take whatever action he deemed necessary, including trusteeship, to put the Local "on a sound financial basis." On June 22, the International president placed Local 75 under trusteeship pursuant to Article 3, Section 2(c) of the International's Constitution and Ritual ("constitution") and named Regional Director Richard Hawkins as trustee.

Hawkins proceeded to propose another dues increase. At a special meeting of the membership on July 24, Lynn spoke in opposition to the proposal, which was defeated. On July 29, Hawkins, citing his power as trustee, notified Lynn that he was removed from his position as business representative because of his opposition to the dues increase. In addition, on August 9, Hawkins filed charges with the union against Lynn, claiming, *inter alia*, that Lynn had acted contrary to the recommendations of the



Executive Board, and that he had argued against the dues increase "in a belligerant manner." While Lynn did not receive a hearing on his removal from office *per se*, he appealed Hawkins' action through the three-step process set forth in the International's constitution. He also received a union trial on the Hawkins charges and was fined $2,500.

Following his removal from office, Lynn registered at the Local's hiring hall, which was created under the terms of a collective bargaining agreement with sheet metal industry employers. Because of his seniority, Lynn was placed on the "A" list and was entitled to be referred to work before non-"A" list members. Lynn alleges that non-"A" list members were referred to work instead of him. Lynn further alleges that when he attempted to file a grievance on this issue with Hawkins, he was told to file it with the Local's business representative; yet, when he attempted to file a grievance with the business representative, he was told to file it with Hawkins as trustee. Thus, no grievance was filed.

On November 3, 1983, Lynn filed a complaint in district court against the International and the Local. His first cause of action, against the International, claimed that his removal from the office of business representative violated sections 101, 102, and 609 of the LMRDA, 29 U.S.C. §§ 411-412, 529, because it infringed upon his free speech rights.[1] His second cause of action, against

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[1] Section 101, 29 U.S.C. § 411, provides in part:

> (a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> (2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and as-

both the International and the Local, alleged that the Local's failure to refer him to work was a violation of the collective bargaining agreement and, thus, a violation of section 301, 29 U.S.C. § 185 (1982). Both the International and the Local filed timely answers; the Local also filed a counterclaim to collect the fines levied against Lynn as a result of Hawkins's charges. In March, 1984, the International filed a motion for partial summary judgment on the first cause of action, the removal from office; Lynn filed a cross-motion for partial summary judgment on the same issue. At the same time, the Local filed a motion for summary judgment on the second cause of action, the "failure to refer" issue, on the basis that Lynn had failed to exhaust internal union remedies; Lynn filed an opposition to this motion, but did not file a cross-motion for summary judgment.

On April 2, 1984, the district court heard the motions, and granted summary judgment for the International on

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semble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 102, 29 U.S.C. § 412, states that:

> Any person whose rights secured by the provisions of this subchapter have been infringed by an violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.



the first cause of action. Two days later, it granted summary judgment for the Local on the second cause of action. Although this left both the complaint against the International on the second cause of action and the Local's counterclaim unresolved, all of the parties agreed that since the International was running the Local through its trustee, Hawkins, a final judgment on all issues had in fact been rendered. On May 4, Lynn appealed. After both parties had briefed the finality issue, this court held on August 8 that we lacked jurisdiction because there had been no final judgment on either the second cause of action *vis-a-vis* the International's or the Local's counterclaim. Our order was filed and served on August 24 and September 10, respectively.

This shifted the case back to the trial court, where a pretrial conference had previously been scheduled for August 27. Since all parties believed that the case was properly on appeal, they had not prepared for the conference, and did not appear. On August 27, the court dismissed Lynn's action and the Local's counterclaim for failure to prosecute and for failure to comply with Local Rule 9, which governs pretrial conferences, but stayed the order and continued the conference until September 24. On September 10, Local 75 filed a notice of non-opposition to the dismissal of its counterclaim. Thus, wth summary judgment having been granted for the International on the first cause of action and for the Local on the second cause of action, and with the union's acquiescence in the dismissal of its counterclaim, the only viable claim at this point was Lynn's second cause of action, the alleged failure to refer him for work, against the International. Lynn's counsel, who had been out of the country from August 8 to September 10, confirmed this with the court clerk shortly after his return.

During the course of this litigation, Lynn had filed charges with the National Labor Relations Board ("NLRB") about the "failure to refer" claim and the NLRB had scheduled hearings on the matter for early

October. Lynn and his counsel were under the impression that the NLRB was proceeding against both the International and the Local. Thus they decided on September 17 not to contest the dismissal of Lynn's second cause of action against the International, reasoning that the NLRB would handle the substantive aspects of Lynn's complaint and that the dismissal by the trial court would allow Lynn to appeal his first cause of action, because a final judgment on the entire complaint would have been rendered. On September 19, however, Lynn and his counsel discovered that the NLRB was proceeding only against the Local and not against the International; thus, contesting the dismissal suddenly became important. However, Lynn and his counsel had not taken steps to prepare this issue for the pretrial conference and, when the conference was held on September 24, asked for another continuance. The court denied the request, and the order dismissing Lynn's complaint became effective. Lynn appeals the grants of summary judgment and the dismissal.[2]

## STANDARD OF REVIEW

Normally, a grant of summary judgment is reviewed *de novo*. *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984); *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). An appellate court's review is governed by the same standard used by a trial court under Federal Rule of Civil Procedure 56(c). *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327,

[2] On September 16, 1985, the attorney for Local 75 informed this court that the International had dissolved Local 75 effective March 1, 1985. According to a letter from the International's president, Locals 509 and 108 now have joint responsibility for Local 75's debts and responsibilities; it is not clear to which local Lynn now belongs. While it appears that a transfer of interest has occurred and, thus, a substitution of parties under Federal Rule 25(c) might be appropriate, because we affirm the district court's grant of summary judgment in favor of the Local, such a substitution is unnecessary.



1328 (9th Cir. 1983); *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1487 (9th Cir. 1983). The reviewing court must determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Prestin v. Mobil Oil Corp.*, 741 F.2d 268, 269 (9th Cir. 1984); *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984). Thus, we will apply the *de novo* standard in reviewing the trial court's actions on Lynn's first cause of action, removal from his position as business representative.

Lynn's second cause of action against the Local involves both procedural and substantive issues. We will apply the *de novo* standard to the procedural issues. However, in considering Lynn's substantive claims, we will follow *Clayton v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 451 U.S. 679, 689, 101 S. Ct. 2088, 2095, 68 L.Ed. 538, 548 (1981), where the Court held that a trial court has discretion in deciding whether exhaustion of internal union remedies should be required before the court would hear the case. *See also Scoggins v. Boeing Co.*, 742 F.2d 1225, 1229-30 (9th Cir. 1984).

With regard to Lynn's third claim, that the trial court should not have dismissed his second cause of action against the International for lack of prosecution, trial courts may exercise their discretion in this area. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31, 633, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962); *Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir. 1984). Thus, we will review the district court's actions here for an abuse of discretion.

## I.

### *First Cause of Action Against the International*

Lynn alleges that his removal of his position as business representative violated his rights under Title I of the LMRDA, 29 U.S.C. §§ 411-412. The leading case in

this area is *Finnegan v. Leu*, 456 U.S. 431, 432-33 (1982), where the Court held that Title I did not apply to appointed union officials who had campaigned against a newly-elected union president; thus, the president had the authority to remove them from their positions. In so holding, the Court said that the purpose of Title I was to protect rank-and-file members and that it was not intended to upset traditional union patronage practices. *See id.* at 436-37. Lynn argues that *Finnegan* does not apply here because it dealt with appointed officials, while he was elected to his position by the membership. The International argues, first, that *Finnegan* should control this case and, second, that even if it does not, Hawkins, acting as trustee, had the authority under the International's constitution to remove Lynn from his post.

A. *Free Speech Rights of Elected Officials*

Whether, in light of *Finnegan*, an elected union official may be removed from office for the exercise of free speech rights guaranteed by the LMRDA presents a question of first impression in this circuit.[3] We hold that, at a minimum, a retaliatory removal from elective office violates section 102 of the LMRDA when it occurs as "a purposeful and deliberate attempt . . . to suppress dissent within the union." *See Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973).[4]

In *Finnegan*, the Court held that section 609 of the LMRDA protects an appointed union official only in his

[3] Our prior cases which discussed *Finnegan* all involved the removal of a policy-making official from appointive office. *See Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356 (9th Cir. 1986); *NLRB v. Carpenters Local Union No. 35*, 739 F.2d 479 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3477 (1985); *Childs v. Local 18 International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983).

[4] We do not address the question of when removal from appointive office, in an attempt to suppress dissent, violates section 102. *See Finnegan*, 456 U.S. at 440-41.



status as a member and not in his status as an officer. *See Finnegan*, 456 U.S. at 437-39. Similarly, the Court emphasized that section 101 of the LMRDA defines an individual's rights as a member of the union, and not his rights as a union officer or employee. *Id.* Thus, an individual may state a cause of action under section 101 only for those acts which violate his membership rights, and not for those which infringe upon whatever rights he may have acquired by virtue of his status as an officer or employee.

However, the Court also said that section 102 of the LMRDA, which protects "[a]*ny person*, whose rights secured by the provisions of this subchapter have been infringed . . .", 29 U.S.C. § 412 (emphasis added), "provides independent authority for a suit against a union based on an alleged violation of Title I of the Act." *Finnegan*, 456 U.S. at 439. Thus, under certain circumstances, an official who alleges that union actions have infringed upon his Title I rights may state a cause of action under section 102. The question before us is whether Lynn's removal from his elected position "infringed" upon his Title I membership rights."

In this case, Lynn, as a member, clearly had the right under section 101(a)(1) "to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings . . .," 29 U.S.C. § 411(a)(1), and also the right "to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon . . . any business properly before the meeting . . .," section 101(a)(2), 29 U.S.C. § 411(a)(2). *See Finnegan*, 456 U.S. at 437 (right to campaign for a candidate protected under section 101); *Sullivan v. Laborers' International Union of North America*, 707 F.2d 347, 350 (8th Cir. 1983) (right to run for office protected by section 101). Thus, when Lynn attended the July 24, 1982 meeting to vote on Hawkin's proposed dues increase and spoke against

it, even though he was an officer, he was exercising a membership right protected by section 101(a).[5]

The next question which arises is whether Lynn's removal from office "infringed" upon his exercise of his Title I membership rights. In *Finnegan*, the Court said that the removal of the officials from office constituted only an indirect interference with their membership rights. *Finnegan*, 456 U.S. at 440. Like the officials in *Finnegan*, Lynn did not suffer any direct infringement of his Title I rights; that is, he was not prevented from attending or speaking at the meeting which considered the dues increase. Rather, like the officials in *Finnegan*, he, too, was ultimately forced to "choos[e] between [his] rights of free expression. . . and [his] job[]." *Id.* (quoting *Retail Clerks Union Local 648 v. Retail Clerks International Ass'n*, 299 F. Supp. 1012, 1021 (D.D.C. 1969)).

This fact is not dispositive, however, for the *Finnegan* Court neither defined the scope of a section 102 claim nor held that only a direct infringement of a Title I

[5] We note that the Eleventh Circuit distinguishes between "membership" speech, a right secured under section 101(a)(2), and "officer" speech, which is not. *Dolan v. Transport Workers Union of America*, 746 F.2d 733, 742 (11th Cir. 1984). "Membership" speech becomes "officer speech" if it "advance[s] her duties of office or interfere[s] with these duties." *Id.* In addition, a policy making or policy-making official may engage in "officer" speech if she "could reasonably be perceived as speaking for the union, or if her speech affects performance of her specific duties . . . ." *Id.*

With all due respect, we do not adopt the Eleventh Circuit's approach, for any speech could arguably "advance," "interfere," or "affect" an officer's performance of her duties: Just as "all speech by a member is, in a sense, membership speech . . . ," *id.*, so all speech by an officer could be "officer" speech. We further note that even if we were to adopt the remaining prong of the Eleventh Circuit's analysis, whether the officer "could reasonably be perceived as speaking for the union," it would not apply here, because Lynn's remarks occurred at an internal union meeting, while Dolan's statements were made to others outside the union.



right was actionable. Further, it is evident that its decision in *Finnegan* was based on Congress's intent in enacting the LMRDA: ". . . [T]he Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. Thus, as in *Finnegan*, permitting an elected president to select appointed administrators who reflect his views furthers the growth of union democracy. *Id.*

However, as the Court noted, the power to remove an official from office may also be used to suppress dissent, either through retaliation, *id.* (citing *Schonfeld*), or through intimidation. The removal of an official under these circumstances can only impede the democratic governance of the union. Here, it is clear that Lynn's removal was precipitated by his outspoken opposition to the proposed dues increase, a position which also reflected the views of the majority of the union membership.[6] This is not a case involving a union patronage system; rather, it concerns an elected officer who is speaking not only for himself as a member, but also as a representative of those members who elected him.[7] We hold that, under these circumstances, Lynn alleged a cause of action under section 102.

B. *Trusteeship*

Article Three, Section 2(c) of the International's constitution gives the International "the authority to sus-

[6] On July 24, 1982, the proposed increase was defeated 130-121. Lynn was removed from office on July 29; Hawkins's letter specifically cited Lynn's failure to support the proposed dues increase as the major reason for his removal. Lynn's actions at the July 24 meeting were also one of the grounds for Hawkins's internal union charges against Lynn.

[7] Allowing the removal of an elected official for exercising his free speech rights would in effect nullify a member's right to vote for a candidate whose views he supports.

pend local union or council officers, business managers, or business representatives . . ." while a local is under trusteeship. The International argues that, even if we were to find that Lynn's removal from office would ordinarily violate his rights under the LMRDA, Hawkins was acting within his authority as trustee, and thus Lynn's removal was proper.

In enacting the Title III trusteeship provisions of the LMRDA, Congress, while recognizing that trusteeships may be an effective tool for insuring internal union order, clearly intended to correct the abuses of trusteeships investigated by the McClellan committee. S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Ad. News, 2318, 2333, *and in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 413 (1959). *See generally*, Beaird, *Union Trusteeship Provisions of the Labor-Management Reporting and Disclosure Act of 1959*, 2 Ga. L. Rev. 469, 485-499 (1968). The imposition of trusteeships "as a means of consolidating the power of corrupt union officers, plundering and dissipating the resources of local unions, and preventing the growth of competing political elements within the organization" was a particular area of congressional concern. *Id.* Thus, Congress enacted section 302 of the LMRDA, 29 U.S.C. § 462, which states that a trusteeship may be imposed only "for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."

In giving effect to this expression of congressional intent, the courts have reviewed trusteeships to insure that they were imposed only for legitimate purposes, *see, e.g., Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, 584 F.2d



308 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979); *Jolly v. Gorman*, 428 F.2d 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). Here, all of the officers of Local 75 asked the International to impose a trusteeship "to put this local on a sound financial basis." Because assuring sound financial management was one of Congress's goals in enacting Title III, and because the trusteeship was initiated by the Local, we find that the imposition of the trusteeship was proper.

However, just as the International may not impose a trusteeship for illegitimate purposes, such as suppressing dissent, *Benda*, 584 F.2d at 317 & n.6, so it may not use the powers inherent in a legitimate trusteeship for similarly illegitimate purposes. Thus, while a trustee may remove an elected local officer for financial misconduct, *Mandaglio v. United Brotherhood of Carpenters and Joiners of America (General Executive Board)*, 575 F. Supp. 646, 649 (E.D.N.Y. 1983), or incompetence, *see Kinney v. International Brotherhood of Electrical Workers*, 669 F.2d 1222, 1227 (9th Cir. 1982) (as amended), it may not do so in retaliation for the exercise of a right protected by the LMRDA, *see id.*, such as free speech, *see Benda*, 584 F.2d at 317 n.6 *Brotherhood of Painters v. Local 127*, 264 F. Supp. 301 (N.D. Cal. 1966).[8] We find that Lynn's allegations of retaliatory removal from his elected office may constitute a violation of his rights under the LMRDA; thus, the district court's grant of summary judgment for the International was improper.

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[8] We find *Buffalow v. Bull*, 619 S.W.2d 913 (Mo. Ct. App. 1981), *rev'd on other grounds, Wimberly v. Motor & Industrial Relations Commission*, 688 S.W.2d 344 (Mo. 1985), *cert. granted*, 106 S. Ct. 1633 (1986), cited by appellants, distinguishable on several grounds, particularly the fact that Buffalow did not allege that his LMRDA free speech rights had been violated by his removal from office. Further, Buffalow was part of the Local's established leadership, rather than head of a dissident group like Lynn.

## II.

*Second Cause of Action Against the Local*

Lynn's second cause of action against the Local, for the alleged failure to refer him to work, raises three questions concerning jurisdiction, the sufficiency of the pleadings, and whether the trial court properly granted the Local's motion for summary judgment. We will consider each of these questions in turn.

A. *Jurisdiction*

Federal Rule of Appellate Procedure 3(c) states in part that "[t]he notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." Fed. R. App. P. 3(c). The initial issue which arises is whether this court has jurisdiction to consider Lynn's appeal of the summary judgment in favor of the Local when the notice of appeal names both the International and the Local, but cites only the judgment in favor of the International, and not the judgment in favor of the Local, as the subject of this appeal.

While some circuits construe Rule 3(c) strictly, *see, e.g., Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1373-75 (11th Cir.), *cert. denied*, 464 U.S. 893, 104 S. Ct. 239, 78 L.Ed.2d 230 (1983) (court will hear appeal of summary judgment, but not appeal of order to vacate injunction); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S. Ct. 974, 71 L.Ed.2d 112 (1981) (court will consider only denial of motion for new trial and not denial of request for attorney's fees), this circuit has held that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellate is not prejudiced by the mistake." *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071, 104 S. Ct. 981, 79 L.Ed.2d 217 (1984); *see also Munoz v. Small Business Administration*, 644 F.2d 1361, 1364 (9th Cir. 1981); *United States v. Walker*, 601 F.2d 1051, 1057-58 (9th Cir. 1979). In determining whether "intent" and "prejudice" are present, we apply a two-part test: first, whether the affected party had notice of the issue on appeal; and, second, whether the affected party had an opportunity to fully brief the issue.



Here, as in *Mercedes Benz*, appellant served the affected party, the Local, with a copy of the brief in which he raised the issue of the Local's alleged failure to dispatch him for work. Further, the Local filed a joint brief with the International in which this issue was fully discussed. Thus, the Local had notice of the issue to be appealed, and did not suffer any prejudice from appellant's failure to include the summary judgment verdict for the Local in his notice of appeal. Therefore, we find that under the *Mercedes Benz* standard, we have jurisdiction to hear Lynn's appeal against the Local.[9]

B. *The Sufficiency of the Pleadings*

The second question to be considered is whether Lynn sufficiently alleged exhaustion of union remedies for the second cause of action in his complaint. Appellees contend that while Lynn alleged that he had exhausted his internal union remedies in his complaint on his first cause of action, the removal from his position of business representative, he did not allege that he had exhausted union remedies with regard to his second cause of action, the failure to dispatch him for work.

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[9] While the appellant in *Mercedes Benz* had moved to amend the notice of appeal, such a motion is not necessary for this court to exercise jurisdiction; neither the *Walker* nor the *Munoz* appellants had moved to amend their notices.

Paragraph 12 of Lynn's complaint on his first cause of action states that "[p]laintiff has spent over four (4) months exhausting internal hearing procedures to correct this unlawful discipline and removal from office to no avail as required by 29 U.S.C. § 411(a)(8) thus conferring jurisdiction on this Court under 29 U.S.C. § 412." On the second cause of action, paragraph 16 states that "[p]laintiff incorporates herein the allegations contained in paragraphs 1 through 15 by this reference as though fully set forth." In their answers, both the International and the Local raised, as an affirmative defense to the second cause of action, the *fact* that Lynn had failed to exhaust internal union remedies. The question of whether Lynn had failed *to allege* exhaustion was first raised, albeit obliquely, in the Local's motion for summary judgment, and surfaced as a full-blown issue in Lynn's opposition to the motion for summary judgment. Here, Lynn stated that exhaustion of remedies was alleged on the second cause of action, because paragraph 16 incorporated paragraph 12's statement of exhaustion. He also attached a declaration stating that he had tried to file a grievance with both the trustee and the business representative, but that each had refused to accept the grievance, saying that it should be filed with the other; presumably Lynn was attempting to demonstrate the futility of pursuing union remedies. The trial court made no findings of fact or law on the "failure to allege" issue, but ruled instead on the substantive exhaustion issue.

"A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). Accordingly, a pleading must 'give [] fair notice and state[] the elements of the claim plainly and succinctly.'" *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (quoting 2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 8.13 at 8-111 (2d Ed. 1983)). Under a strict reading of Lynn's complaint, it would appear that he failed to



allege exhaustion of union remedies for the failure to dispatch for work claim, because paragraph 12 only refers to exhaustion of remedies for the job removal claim.

However, under the liberal Federal approach, the purpose of the pleadings is to provide the opposing party with fair notice of the claim against it. *See, e.g., Shelter Mutual Ins. Co. v. Public Water Supply Dist. No. 7*, 747 F.2d 1195, 1197 (8th Cir. 1984); *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir.), *cert. denied*, 429 U.S. 870, 97 S. Ct. 182, 50 L.Ed.2d 150 (1976). The Federal Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 906 (2d Cir. 1977) (quoting *United States v. Hougham*, 364 U.S. 310, 317 (1960)). Courts should construe pleadings liberally so as to do substantial justice, *see, e.g., Scherping v. Commissioner*, 747 F.2d 478, 480 (8th Cir. 1984); *Planned Parenthood Ass'n of Utah v. Schweiker*, 700 F.2d 710, 720, 226 U.S. App. D.C. 139 (D.C. Cir. 1983), and should do so, if possible, in favor of the plaintiff. *Sennett v. Oppenheimer & Co., Inc.*, 502 F. Supp. 939, 942 (N.D. Ill. 1980); *see also Herceg v. Hustler Magazine, Inc.*, 583 F. Supp. 1566, 1567 (S.D. Tex. 1984).

Here, a review of the record shows that both the International and the Local had fair notice of the nature of Lynn's claim of failure to dispatch him for work, and were able to litigate fully the exhaustion issue. Further, although Lynn did not move to amend his complaint, he did provide information in his opposition to the motion for summary judgment to support his claim that attempting to exhaust union remedies was futile, and the district court apparently considered this information in ruling

on the merits of the exhaustion issue.[10] Thus, because the International and the Local suffered no prejudice from Lynn's failure to allege more explicitly the exhaustion of union remedies in his second cause of action, we will construe the pleadings in Lynn's favor, and consider the issue on the merits.

C. *The Grant of Summary Judgment*

Whether the trial court properly granted the Local's motion for summary judgment raises two questions: First, was there a disputed issue of material fact, which would preclude the district court, as a matter of law, from granting summary judgment in favor of the Local? Second, did the trial court abuse its discretion in requiring exhaustion of union remedies?

With regard to the first question, a court may grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Here, the district court made the following findings of fact:

> 7. It is a controverted fact whether or not Lynn has sought to grieve his dispute by using the available grievance and arbitration remedies under the [collective bargaining] Agreement.
>
> . . . .
>
> 9. Lynn has not attempted to use the Article 19 procedures of the Constitution with respect to his claim of job discrimination. He has neither alleged nor made a factual showing of any hostility suffi-

[10] The district court could properly consider Lynn's affidavit in ruling on the motions for summary judgment, since Rule 56(c) indicates that the court should consider "the pleadings, depositions, answers to interrogatories, if any" in deciding whether to grant a summary judgment motion." Fed. R. Civ. P. 56(c).



> cient to impair a fair hearing, that the Article 19 procedures are inadequate or of unreasonable delay.[11]

Lynn argues that because the district court found a controverted issue of fact, it could not grant summary judgment under Rule 56(c). The Local contends that the district court granted summary judgment on the uncontroverted fact in paragraph 9, that Lynn had not attempted to use the Article 19 procedures and hence had not exhausted his union remedies.

While there is no doubt that Lynn's attempts to file a grievance under the collective bargaining agreement are contested by the parties, "a dispute as to an immaterial fact does not preclude summary judgment." 10A C. Wright, A. Miller, & M.K. Kane, Federal Practice and Procedure 2725 at 89 (2d Ed. 1983). In this circuit, "[a] material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir. 1982). Because the collective bargaining procedures and the Article 19 procedures are separate proceedings, bargaining agreement are not relevant to his failure to Lynn's attempts to file a grievance under the collective bargaining agreement are not relevant to his failure to exhaust his Article 19 remedies; thus, they do not affect the outcome of this issue. Hence, the Local's contention that the court granted summary judgment on an uncontroverted fact, failure to exhaust Article 19 remedies, is correct.

[11] Article 19 of the Sheet Metal Workers' International Association Constitution and Ritual first states that ". . . any member . . . whose constitutional rights are violated by any decision or order of a local union or council . . . shall have the right to appeal as provided in this Article." § 1. It then sets out a series of appeals which may be taken to the General President (§ 2), the General Executive Council (§ 3), and finally the General Convention (§ 4). Finally, section 9 states that "[s]ubject to applicable laws, no local union, council, or officer or member thereof shall appeal to the Civil Courts for redress until all the internal remedies provided in this Constitution, including the right to appeal, have been exhausted."

This then raises the question of whether the district court abused its discretion in doing so. In *Scoggins*, this court stated:

> In this circuit, when a party moves for summary judgment in a Section 301 action citing failure to exhaust internal union remedies, the moving party must first establish the availability of adequate internal union remedies; the burden then shifts to the party opposing the motion to respond by affidavits or otherwise and set forth specific facts showing that exhaustion of remedies would have been futile.

*Scoggins*, 742 F.2d at 1230. Here, the Local did provide evidence of the availability of internal remedies by submitting its constitution, including Article 19. Thus, the burden now shifts to Lynn to show that to attempt to exhaust these remedies would be futile.

In *Clayton*, the Court held that a trial court has discretion in determining whether exhaustion of internal union remedies would be futile. In doing so, the court should consider at least three factors:

> first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

*Clayton*, 451 U.S. at 689.

To demonstrate the first factor, Lynn alleges that the failure to process his collective bargaining grievance



showed hostility at the Local level, and that the use of Article 19 procedures for his second cause of action would be futile because the International had ruled against him on his first cause of action. While Lynn did provide some evidence, through his declaration, that hostility towards him did exist at the Local level, he provided no evidence to support his contention that the individuals involved in the rest of the Article 19 process would handle his second claim unfairly.

The second factor, inadequacy, has two components, inability to reactive the grievance and inability to award the plaintiff full relief. First, as in *Scoggins*, the record shows that Lynn did not argue the reactivation issue at the district court level and, hence, may not raise this issue on appeal. *Id.* at 1229-30. Second, Lynn claims that the appeals process is inadequate because it would not provide compensation for lost wages. However, Article 19, section 8 allows each of the decisionmakers in the process to "fix the penalty, if any" for infractions. Thus, Lynn could obtain monetary damages through the union procedures.

Finally, as far as the third factor, unreasonable delay, is concerned, under 29 U.S.C. § 411(a)(4), a member is not required to wait more than four months for the exhaustion of internal remedies before filing suit. More important, in his opposition motion, Lynn indicated a willingness to comply with the internal procedures for the four-month period. Thus, he cannot now argue that the four-month period caused an unreasonable delay in the handling of his case.

Based on our review of the *Clayton* factors, we find that the district court did not abuse its discretion in requiring Lynn to exhaust his union remedies and in granting summary judgment for the Local.[12]

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[12] Because we affirm the summary judgment on the grounds that Lynn failed to exhaust his administrative remedies, we do

## III.

*Second Cause of Action Against the International*

Lynn contends that the district court abused its discretion in dismissing his second cause of action, alleging a failure to refer him to work, for failure to prosecute under Local Rule 9.[12] In this case, the district court had

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not address the question of whether the alleged failure to refer to work is impermissible discipline, *compare Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114, 122 (6th Cir. 1985) (manipulation of referral system impermissible) *with Hackenburg v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 101 Thereof*, 694 F.2d 1237, 1239 (10th Cir. 1982) ("benching" permissible), or a violation of the LMRA, 29 U.S.C. § 185.

[12] The Central District of California's Local Rule 9 states that:

> No continuance shall be granted merely on the stipulation of the parties. If the Court is satisfied that counsel are preparing the case with diligence and additional time is required to comply with this rule, the Pre-Trial Conference may be continued upon submission of a timely stipulation signed by all counsel setting forth the reasons for the requested continuance. The stipulation should also set forth what has been accomplished in preparing the case for the Pre-Trial Conference. No continuance will be granted unless the stipulation has been lodged before the date upon which the Pre-Trial Conference Order must be lodged with the Court. Counsel shall inform the court clerk immediately by telephone or other expeditious means when a stipulation is to be submitted for continuance of the Pre-Trial Conference.
>
> A motion for continuance may be noticed upon five (5) days' notice to be heard not later than the last Motion Day before the date for which the Pre-Trial Conference has been set.

Local Rule 27.2 provides that

> Failure of counsel for any party to take any of the following steps may be deemed an abandonment or failure to prosecute or defend diligently by the defaulting party:
>
> (a) Complete the necessary preparation for pre-trial;
>
> (b) Appeal at pre-trial conferences;
>
> (c) Be prepared for trial on the date set; or



continued the pretrial conference once, presumably because of the unexpected dismissal of the appeal. However, even if we take into account the time Lynn's attorney was out of the country, he still had approximately two weeks, from his return on September 10 until the conference date of September 24, within which to ascertain the nature of the NLRB proceedings and to prepare for the conference. Further, even if we were sympathetic to Lynn's mistaken strategic decision, there was still a five-day period between September 19, when Lynn's counsel learned of the true nature of the NLRB proceedings, and the pretrial conference date.

A review of the record shows that Lynn's counsel took no action either to apprise the court and opposing counsel of the situation or to prepare for the conference. Under these circumstances, we find that the trial court acted within its discretion in dismissing Lynn's second cause of action against the International.

## CONCLUSION

The district court's grant of summary judgment on Lynn's first cause of action is reversed, and the case is remanded to the district court for further proceedings. The grants of summary judgment for the International and the Local on the second cause of action are affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED.

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> (d) Appear at any hearing where service of notice of the hearing has been given or waived.
>
> Judgment may be entered against the defaulting party either with respect to a specific issue or on the entire case.

KENNEDY, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that the trial court was correct in its grant of summary judgment to the Local on the work referral claim and in its dismissal of the same claim against the International for failure to prosecute. I concur in Parts II and III of the court's opinion.

I submit with all respect, however, that the majority errs in holding that union leadership cannot discharge a business manager who actively opposes the leadership on a fundamental issue of union policy. The majority reaches this conclusion only by what I conclude is a misreading of the Supreme Court's opinion in *Finnegan v. Leu*, 456 U.S. 431 (1982). The majority's error is compounded by the creation of an unwarranted conflict with the two other circuits that have addressed the point. I dissent from the court's holding on this critical aspect of the case, set out in Part I of its opinion.

There is no dispute that Lynn, as a union member, had the right to participate in and vote at membership meetings, 29 U.S.C. § 411(a)(1), and express his views on business before such meetings, 29 U.S.C. § 411(a)(2); it is also not disputed that he was discharged by Trustee Hamkins from his position as business representative when he exercised these rights to speak against Hawkins' proposed dues increase at the special June 24 membership meeting. Although this action indirectly penalizes Lynn for his exercise of protected rights, it does so only in his capacity as an officer, not as a member. Absent a serious threat to the continued democratic governance of the union, such a dismissal does not violate the rights of union membership protected by the LMRDA, and the case authority on this point from other circuits is persuasive.

In *Finnegan* the Supreme Court held that an appointed union official discharged from office for supporting a defeated candidate for union president could not state a claim for violation of membership rights secured by the LMRDA, 29 U.S.C. § 411(a). I should have thought it explicit in *Finnegan* that the key distinction is between an infringement on rights in the complainant's capacity as a union member and the termination of his privilege to act as a union officer. The Supreme Court observed "that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect" when it enacted Title I of the LMRDA. 456 U.S. at 437. The fact that the conduct complained of in *Finnegan* indirectly interfered with membership rights, interference which may well have forced the removed officials to " 'choos[e] between their rights of free expression . . . and their jobs,' " *id.* at 440 (quoting *Retail Clerks Union Local 648 v. Retail Clerks International Association*, 299 F. Supp. 1012, 1021 (D.D.C. 1969)), was deemed insufficient to state a claim for infringement of rights secured by 29 U.S.C. § 411(a).



The Court in *Finnegan* left open the possibility that in some circumstances the retaliatory discharge of a union member from office might give rise to a cause of action under 29 U.S.C. §§ 411, 412. 456 U.S. at 440-41. The majority believes this to be such a case, finding that Lynn's dismissal came about because he outspokenly opposed the dues increase, and that LMRDA prohibits dismissal on these grounds because of the threat to democratic union governance. This conclusion not only misconstrues whatever exception to its holding the Supreme Court intended to leave open in *Finnegan*, but also departs from the understanding of the other circuits faced with determining the applicability of *Finnegan* to removals of elected union officials. Those courts have recognized that the potential threat to democratic governance that may inhere in permitting removals of elected union officials for opposing the views of other union officials does not transform allegations of ouster from of-

fice into a claim for infringement of membership speech. *Dolan v. Transport Workers Union of America*, 746 F.2d 733, 741 (11th Cir. 1984); *Adams-Lundy v. Association of Professional Flight Attendants*, 731 F.2d 1154, 1159 (5th Cir. 1984) (fact that removed officer was elected does not suffice to create a claim under LMRDA); *see also Sullivan v. Laborers' International Union of North America*, 707 F.2d 347, 350 (8th Cir. 1983) (union's suspenison of elected business manager did not, by itself, infringe officer's rights as a union member).

I agree with the majority's view, expressed in footnote 5, that the Eleventh Circuit's distinction in *Dolan* between officer speech and member speech is unnecessary and problematic. However, the majority's argument on this point actually cuts against its conclusion. *Finnegan* rests on the proposition that Title I protects rank-and-file union members, not officers. The nature of the speech prompting the removal is essentially irrelevant. As the Fifth Circuit recognized, removal of union officials, whether elected or appointed, does not sufficiently impair the integrity of union democracy to contravene membership rights protected by the LMRDA unless, as the Court in *Finnegan* suggested, the dismissal was part of "'a purposeful and deliberate attempt to suppress dissent within the union.'" *Adams-Lundy*, 731 F.2d at 1159 (quoting *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973)); *see also Finnegan*, 456 U.S. at 441. Whatever the boundaries of any exception to the *Finnegan* rule might be, the mere fact that Lynn was an elected officer is not sufficient to bring this case within that exception. At least absent allegations that his suspension was part of a scheme to subvert the union's basic democratic structure, *Adams-Lundy*, 731 F.2d at 1159, or that his was a "nonconfidential and nonpolicymaking" position, *Finnegan*, 456 U.S. at 441 n.11 (leaving open applicability of holding to such employees), the injury suffered by Lynn is primarily connected with his status



as an officer, not a union member, and does not support a claim under the LMRDA.

The courts that have considered the applicability of *Finnegan* to dismissals of elected union officials for the exercise of free speech or voting rights granted them as union members have noted the need of federal courts to exercise caution when asked to intervene in disputes between union officials. Here, the majority uses the occasion of a routine dismissal of an officer for failure to implement policy as its excuse to begin intervention and oversight in union affairs. Congress did not intend this intervention in the enactment of the LMRDA; we should not on the facts of this case begin intruding upon the details of union administration. *See Dolan*, 746 F.2d at 742 (when asked to intervene "in decisions made by [union] management about management, courts must measure their steps with extreme care"); *Adams-Lundy*, 731 F.2d at 1159 ("Congress has favored extrajudicial resolution of [labor] disputes"). The hesitancy of federal courts to attempt resolution of internal disputes between union officials does not evidence unfaithfulness to the LMRDA's goal of ensuring that unions have democratic governance. Rather, it reflects an understanding that, absent a serious threat to the union's basic democratic structure, "the ultimate power of decision" in such disputes is "vested in the voting membership of the union who have the ability to defeat officers abusing or misemploying their powers." *Adams-Lundy*, 731 F.2d at 1160. It should also be said that unions, too, have an interest in efficiency and orderly management, goals frustrated by today's ruling of the majority.

I dissent from that portion of the court's decision reversing the grant of summary judgment to the International on Lynn's job removal claim.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 84-6447

D.C. No. CV 83-7146-AWT

EDWARD LYNN,
*Plaintiff-Appellant,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL NO. 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Central District of California

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[Filed Feb. 4, 1987]

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ORDER

Before: BROWNING, KENNEDY, and HUG, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.



## APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

No. CV 83-7146-AWT(Kx)

EDWARD LYNN,
*Plaintiff,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,
*Defendants.*

---

Hearing date : April 2, 1984

Hearing time : 10:00 a.m.

Courtroom : 6

## ORDER OF PARTIAL SUMMARY JUDGMENT

This Cause having come on to be heard on motion of defendant Sheet Metal Workers' International Association, AFL-CIO, for a partial summary judgment dismissing the First Cause of Action from the complaint and the court having considered the pleadings, the deposition of the plaintiff and the exhibits appended thereto and the briefs submitted by the parties, it is hereby

ORDERED that the defendants' motion for a partial summary judgment, be, and the same hereby is, granted, and plaintiff's motion is denied, and it is further

ORDERED, that plaintiff's First Cause of Action be, and the same hereby is, dismissed on the merits.

A. WALLACE TASHIMA
United States District Judge

DATED: APR 03, 1984



## APPENDIX D

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

No. CV 83-7146-AWT(Kx)

EDWARD LYNN,
*Plaintiff,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,
*Defendants.*

---

Hearing date : April 2, 1984
Hearing time : 10:00 a.m.
Courtroom : 6

## STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

The Court determines that each of the following are uncontroverted facts with respect to the First Cause of Action in the Complaint herein:

1. Plaintiff Edward Lynn (Lynn) is a resident of Orange County, California and at all times relevent (sic) herein was a member in good standing of defendant Local Union No. 75, Sheet Metal Workers' International Association, AFL-CIO (Local 75).

2. Local 75 is a labor union and collective bargaining representative of sheet metal workers in the Los Angeles area who are employed in the sign, food service, and industrial sheet metal industries.

3. Local 75 is affiliated with an international union, defendant Sheet Metal Workers' International Association, AFL-CIO (International).

4. The terms of the relationship between Local 75 and the International are prescribed in a written instrument known as the Constitution and Ritual of the International (Constitution).

5. The Constitution in effect on July 29, 1982, when Lynn alleges he was denied or deprived of rights accruing to him under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), was the one adopted at the International's Thirty-fifth General Convention in St. Louis, Missouri on July 31 to August 4, 1978.

6. In June of 1981, Lynn was duly nominated and elected to the full-time position of business representative of Local 75. The term of office for the position was three years.

7. Other individuals duly nominated and elected to full-time, three-year positions in Local 75 in June of 1981



were Virgil Fox (Fox), business manager-financial secretary/treasurer and James Johnson (Johnson), business representative.

8. The financial condition of Local 75 on June 12, 1982, was such that all of the local union's officers, its business representatives, and business manager signed and sent a letter to the International's President, Edward J. Carlough (Carlough), recommending that the local union be placed under trusteeship.

9. General President Carlough, the International's highest executive and administrative official, placed Local 75 under trusteeship on June 22, 1982, and appointed Richard Hawkins (Hawkins) as the International's trustee.

10. General President Carlough delegated to Hawkins as his personal representative authority under Article Three (3), Section 2(c) of the International's constitution "to take such action as he deems necessary to protect the interest and welfare of Local 75, its funds, property and membership and the interest and welfare of the International Association [including] but . . . not limited to, the right to suspend local union officers, the Business Manager, and/or the Business Representatives, to fill vacancies in such positions, or offices by appointment or special election or to leave such positions or offices vacant, to hire or discharge any clerical, professional or legal personnel, or to empound (sic) and/or audit the books, records and property of Local Union 75."

11. Hawkins discussed the problems of Local 75 with a number of people, including Lynn.

12. Hawkins told the officers and representatives of Local 75, including Lynn, that an increase in the monthly membership dues from two to three hours' pay per month and an increase in the initiation fee was necessary to alleviate the local union's financial crisis.

13. The Local 75 executive board approved Hawkins' recommendation for dues and initiation fee increases and

a special membership meeting of Local 75 was called for Saturday, July 24, 1982, at which the proposed increases were to be discussed and voted upon by secret ballot.

14. Prior to the July 24, 1982, special meeting of Local 75, Hawkins asked Lynn to support the increases in dues and initiation fees. Lynn stated before the members of the Local 75 executive board that he would not support them. Hawkins subsequently asked Lynn what it would take to get his support for the measures and Lynn responded that, among other things, he would have to get rid of Fox and Johnson. Hawkins refused to take such action.

15. At the special meeting of Local 75 on July 24, 1982, Hawkins and a number of members and officials spoke in support of the proposed increases. Lynn and some other members spoke in opposition to it.

16. The proposed increases were defeated in a secret ballot vote of the members attending the special meeting. The vote was 130 against and 121 for the measures. Lynn takes credit in part at least for defeat of the measures.

17. Five days after the special meeting, i.e, on July 29, 1982, Hawkins notified Lynn by letter that he was being removed from office indefinitely because of his opposition to the increases proposed at the July 24, 1982, special membership meeting and other actions detrimental to the interests of the union and its membership.

18. Lynn exercised his rights of appeal from his indefinite removal from office. His appeal was denied by the International's General Executive Council on August 27, 1982, and by its General Convention on September 2, 1982.

19. Appeal to the International's General Convention is the final step in the internal union grievance procedure.



## CONCLUSIONS OF LAW

1. The court has jurisdiction over the claim in the First Cause of Action pursuant to 28 USC § 1337 and 29 USC § 412.

2. When a trusteeship is imposed, the General President of the International has constitutional authority to suspend from office any or all local union officers and business representatives or the business manager irrespective of whether such offices or positions were elective or appointive, provided that he deems such action necessary to protect the interest and welfare of the local union and its funds, property, and membership.

3. Hawkins, as trustee of Local 75, and the personal representative of the General President, indefinitely removed Lynn from his elective, full-time position as business representative of Local 75 after Lynn opposed and spoke against an important measure that Hawkins believed was essential to the local union's welfare and wanted Lynn to support: an increase in the local union's monthly membership dues and its initiation fees.

4. The validity of Hawkins' action was upheld by the International's highest appellate tribunal, its General Convention, on the ground that it was constitutionally permissible conduct. The decision of the General Convention based upon a fair and reasonable interpretation of the International Constitution should be accorded deference by the court. *English v. Cunningham*, 282 F2d 848, 850 (D.C. Cir. 1960); *Vestal v. Hoffa*, 451 F2d 706 (6th Cir. 1971); *Stelling v. IBEW*, 587 F2d 1379, 1389 (9th Cir. 1978). Hence, the court concludes that Hawkins' indefinite removal of Lynn from his position as business representative was action Hawkins was authorized to take in his capacity as International trustee. The question remaining is whether such action was violative of any of Lynn's rights under §§ 411(a)(2) or (5) or 529 of the Labor Management Reporting and Disclosure Act of 1959, 29 USC § 401 et seq.

5. Lynn's indefinite removal from employment as a business representative, for opposing Hawkins' policy favoring dues and initiation fee increases, occurred while the local union was under an International trusteeship, and at a time that Lynn was serving in this position at the pleasure of the trustee. His removal under these circumstances was not "discipline" within the meaning of § 411 (a) (5) of the Act because such action had no effect on his membership rights, which are what the Act was intended to protect. *Finnegan v. Leu*, 456 US 431 (1982). Accordingly, he was not denied any statutory membership rights under § 411(a) (5) which requires as conditions precedent to the imposition of "discipline" service of specific written charges, a • • •

• • • •

6. Lynn's indefinite removal from office for opposing and speaking out against Hawkins' policy favoring dues and initiation fee increases was likewise not "discipline" within the meaning of § 529 of the Act for exercising rights of freedom of speech guaranteed to union members in § 411(a) (2). His § 411(a) (2) right as a member to speak out on issues involving union affairs was not diminished or impaired by his dismissal from employment as a full-time agent of the local union. A union member's statutory right to oppose union policies affords him no protection against dismissal from employment as an agent of the union because of such opposition. *Finnegan v. Leu*, supra.

7. The First Cause of Action of the Complaint is without merit as a matter of law. No violation of any LMRDA right is alleged in the First Cause of Action, except removal from office.

DATED: APR 03, 1984

A. WALLACE TASHIMA
United States District Judge



## APPENDIX E

## LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT (LANDRUM-GRIFFIN ACT)

Pub.L.No. 86-257, 86th Cong., 2d Sess., 1959, 73 Stat. 519, as amended; 29 U.S.C. §§ 401-531.

• • • •

### TITLE I

### BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

#### BILL OF RIGHTS

SEC. 101. (a) (1) EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

• • • •

CIVIL ENFORCEMENT

SEC. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

• • • •

## TITLE III

### TRUSTEESHIPS

• • • •

PURPOSES FOR WHICH A TRUSTEESHIP MAY BE ESTABLISHED

SEC. 302. Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legislative objects of such labor organization.

• • • •

PROHIBITION ON CERTAIN DISCIPLINE BY LABOR ORGANIZATIONS

SEC. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

# OPPOSITION

# BRIEF

86-1940

No.——



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

---

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Petitioners,*

v.

EDWARD LYNN,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## STATEMENT OF CASE

Petitioners make a valiant attempt to meet the test in Rule 17.1(a) to show a conflict in the Circuits. That effort is for naught upon close inspection of the cases cited by the Petitioners. Indeed, one major citation, Adams-Lundy v. Flight Attendants, 731 F.2d 1153 (5th Cir., 1984) '[Adams-Lundy I] actually supports Respondent's position:

> "Sometimes, however, one group or faction within a union may become so entrenched and despotic that the democratic character of the union is threatened. When this happens, and when the dominant group strives to stifle dissent and efforts at reform within the union, the rights of union members to belong to an open democratic labor organization are infringed. As these are the core interests protected by the LMRDA, the Act does provide a remedy in such a case, even if the particular repressive ac-

> tion challenged is the removal from office of a political opponent of the dominent clique - an action not ordinarily comprehended by the terms of §102."

Adams-Lundy I did not arise out of such a set of circumstances but rather internal union factionalism.

## STATEMENT OF FACTS

Respondent, Edward Lynn [Lynn], was at all times relevant a member of The Sheet Metal Workers' International Association, Local 75, Petitioner herein [International] and in June of 1981 was elected to a 3-year term as Business Representative. This was a full-time, paid position. Lynn ran on a platform of economy in the operation of the union.

Lynn also aided in the formation of Sheet Metal Club Local No. 75 which was critical of expenditures

by local union officials, published a news letter and spoke out at union meetings in opposition to expenditures and several dues increases.

In June of 1982, Lynn and other officers in Local 75 wrote the International President to "take whatever action you deem necessary including, but not limited to, trusteeship to put this local on a sound financial basis." The International appointed Richard Hawkins [Hawkins] as trustee.

Lynn was shocked when Hawkins did nothing to reduce expenditures but rather merely proposed another dues increase. At a special meeting of Local 75 on July 24, 1982, Hawkins and other officers proposed a dues increase. Lynn and other members spoke out against the measure.

The dues increase was defeated by 130 to 121.

Five days later on July 29, 1982, Hawkins notified Lynn that he was being removed from his duly elected office because of his opposition to the dues increase and failure to support the officers of Local 75.

On August 9, 1982, Hawkins charged Lynn with generally opposing the wishes of the Executive Board. Under the International Constitution, Lynn was entitled to a trial on the charges but this was never provided. Under Article 19 of the Constitution, Lynn could and did appeal his removal from office to the ultimate appeals authority, the International General Convention, Lynn's appeal was denied.

Following Lynn's removal from of-

fice, a dues increase was passed by Local 75 by a small majority.

Petitioners maintain that by virtue of the trusteeship they could remove Lynn from office notwithstandint the LMRDA, 29 U.S.C. §§401 et seq., but inconsistently maintain a vote of the membership was required to raise dues because of the LMRDA, §101(a)(3), 29 U.S.C. §411(a)(3).

Respondent maintains Certiorari should not be granted for there is no split in the Cicuits and the Ninth Circuit decision below comports with this Court's teachings in Finnegan v. Leu, 456 U.S. 431 (1982), and Schonfeld v. Penza, 477 F.2d 899 (2d Cir., 1973), cited approvingly in Finnegan.

## ARGUMENT

## I

## THERE IS NO SPLIT IN THE CIRCUITS

It should be noted at the onset that Finnegan is but five years old and the Courts below have had little opportunity to rule on a sufficient number of cases and thus this case is not "ripe" for Certiorari. The dissent in Lynn v. Sheet Metal Workers' International Association, et al, 804 F.2d 1472 (9th Cir., 1986), below could cite but three cases subsequent to Finnegan. None is in point.

Adams-Lundy I, supra, involved a union loyalty issue within the Executive Board and the expelled officers rushed into Federal Court without exhausting internal union remedies. The

Fifth Circuit reaffirmed its holding in Miller v. Holden, 535 F.2d 912 (5th Cir., 1976) that a §102 cause of action existed for violation of free speech rights and subsequent retaliation. However, such did not exist in this case. Injunctive relief was denied with a suggestion they utilize their own internal remedies which including arbitration.

Even though Adams-Lundy I is not in point with the case at bar, the Fifth Circuit tends to support the Ninth Circuit holding in this matter:

> The Ninth Circuit herein states,
>
> "We hold that, at a minimum, a retaliatory removal from elective office violates section 102 of the LMRDA when it occurs as 'a purposeful and deliberate attempt...to suppress dissent within the union.'

See Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir., 1973)."

If anything, the Fifth Circuit goes a step further:

> "...Schonfeld teaches that the integrity of these democratic institutions is not impaired sufficiently to contravene the Act unless there is 'a purposeful and deliberate attempt to suppress dissent within the union,' 477 F.2d at 904 - in which event, the firing of even an appointed official would presumably violate the Act. See Finnegan v. Leu; Miller v. Holden."

Likewise, Dolan v. Transport Workers' Union, 746 F.2d 733 (11th Cir., 1984) supports the Ninth Circuit holding rather than creating some nebulous "middle ground" as Petitioners assert. Dolan, like Adams-Lundy I, is not in point with Lynn. In addition to the distinctions made by the Ninth Circuit at ff. 5, Dolan was discharged for hindering union democracy rather than promoting it.

She failed to call Executive Board meetings as required, failed to follow Board directives, had not paid her union dues, and was charged with misappropriation of funds. The Dolan Court acknowledges the distinction at ff. 17:

> "Allegations that discharge of an officer was 'part of a purposeful and deliberate attempt to suppress dissent within the union' would raise other questions. See Finnegan, supra, quoting Schonfeld v. Penza. [citations omitted] Because Dolan makes no such allegations we leave resolution of those questions to another day."

Dolan's only "speech" issues were her public pronouncements against a wage freeze and a member's grievance. These had nothing to do with internal union democracy as involved here. The 11th Circuit seems to recognize this with:

> "If the court determines that an officer could reasonably be perceived as speaking for the union, or if her speech affects performance of her specific duties, the protections of §411 (a)(2) for membership speech do not apply."

By this, the court implies that if the speech is not for the union nor an impairment of the officer's duties, it becomes "membership" speech and protected. By this somewhat convoluted reasoning, Lynn's speech was protected since it did not affect his duties as a union business agent nor was he speaking in behalf of the union. Rather, as the Ninth Circuit points out at ff. 5, Lynn was speaking out on an internal union matter, at a union meeting, not public, on a dues increase which affected his union membership rights and not his officer status.

The Eleventh Circuit continues in Dolan:

> "...motive is not irrelevant to analyzing the deprivation of a member's free speech rights....The application of otherwise reasonable union rules, however, can constitute a §411(a)(2) violation only when exercised in a retaliatory manner with regard to member, not officer, speech."

Thus, to the extent Dolan has any relevance to Lynn, it supports his position and that of the Ninth Circuit.

The last case in the trilogy is Sullivan v. Laborers, 707 F.2d 347 (8th Cir., 1983). This case has little to nothing in common with Lynn. Sullivan was removed as district manager of a Council for non-performance of his duties. He raised only procedural questions under §411(a)(5) - not speech.

Even the procedural aspects had nothing to do with specific charges, time to prepare a defense, or a full and fair hearing, under §411(a)(5). Instead, Sullivan complained that the Union's general president lacked authority to investigate and decide the eligibility of delegates to vote at his hearing.

Thus, there is no conflict in the Circuits and the cases cited tend to support the Ninth Circuit decision.

## THE NINTH CIRCUIT DECISION COMPORTS WITH FINNEGAN v. LEU

Petitioners seem to view Finnegan as a license to remove any official who disagrees with them. Obviously, this Court did not go that far as evidenced by the citation, approvingly, of Shonfeld v. Penza, supra.

Also, this Court cites Wirtz v. Hotel Employees, Local 6, 391 U.S. 492 (1968) for the proposition that the Act was designed to preserve democratically governed unions, responsive to the will of the membership.

Rather, Finnegan avoids the use of the term "officer" in preference to "staff" and "employee" to emphasize removal of business agents who were appointed as not being "duly elected officers" which inherently is the decision of the voting membership. The majority at ff. 11 left open the question if non-policy making employees would not be covered by the Act, and Justices Blackmun and Brennan, in concurring, specifically cited this point.

Petitioner's reliance on Finnegan is misplaced as the Ninth Circuit so held; Lynn was a duly elected officer and exercised his membership right to speak out on a dues increase. His election reflected the will of the voting membership and his position on the dues increase also reflected the memberships' opinion at a union meeting, not open to the public, involving strictly internal union matters.

Even Dolan v. TWU and Sullivan discussed Title I protection to an officer wanting to run for election as a membership right which could not be abrogated absent Title I protection, even if the officer was summarily removed for misconduct. Thus, the membership right to run for of-

fice would be a meaningless gesture if the officer could be summarily removed because he disagreed with the majority on how the union should be run. Union democracy sought to be achieved by the Act would be thwarted by this theory.

Petitioner's "trusteeship" argument was disposed of quite succinctly by the Ninth Circuit and requires no further elaboration here. In essence, petitioner could not do indirectly via trusteeship that which it could not do directly.

## CONCLUSION

Petitioner has failed to show any conflict in the Circuits nor a departure from this Court's holding in Finnegan. At best, petitioners mere-

ly repeat their arguments made in the Ninth Circuit and disagree with an adverse ruling. The petition for a writ of certiorari should be denied.

Dated: June 15, 1987.

Respectfully submitted,

BRUCE M. STARK

Attorney for Respondent

# REPLY BRIEF

No. 86-1940

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## REPLY BRIEF FOR PETITIONERS

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IN THE

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## REPLY BRIEF FOR PETITIONERS

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### ARGUMENT

Respondent's brief in opposition rests on the premise that the decision below applies the same legal standard to judge the lawfulness of the removal of an elected union officer from union office that this Court in *Finnegan v. Leu*, 456 U.S. 441 (1982), applied to the removal of an appointed union official. On that basis, respondent attempts to reconcile the decision below with *Finnegan* and with the decisions of the other court of appeals which have addressed the issue of the Labor Management Re-

porting & Disclosure Act's (LMRDA) application to the removal of union officers. *See Adams-Lundy v. Flight Attendants*, 731 F.2d 1153 (5th Cir. 1984); *Dolan v. Transport Workers Union*, 746 F.2d 733 (11th Cir. 1984); *cf. Sullivan v. Laborers District Council*, 707 F.2d 347 (8th Cir. 1983). Respondent's argument rests on a false premise: the standard applied by the court below is manifestly irreconcilable with this Court's *Finnegan* standard.

Before demonstrating that point, we pause to highlight an omission in the brief in opposition. Respondent makes *no* attempt to respond to, let alone defeat, the showing in our *certiorari* petition (at pp. 9-12), that, whatever the proper rule governing the dismissal of elected officers, in this case respondent (plaintiff in the district court), although originally elected to office, was serving at the pleasure of an International trustee at the time of his dismissal. Because that is so, the dismissal of respondent from his position as business agent cannot be meaningfully distinguished from the dismissal of the business agents in *Finnegan* and the decision below cannot be squared with this Court's *Finnegan* decision.

1. In *Finnegan*, union members who held staff positions with the union as appointed business agents were discharged from such employment because they had exercised their right "as union members . . . to campaign for [the defeated candidate for union president]," 456 U.S. at 440. This Court, recognizing that the plaintiffs had been discharged for exercise of their LMRDA rights, held that the discharges were nonetheless lawful because the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id.* at 441. The only exception the Court recognized to this general rule is that, as the Second Circuit had held in *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973), the LMRDA may "limit[] a union's authority to utilize dismissal from union office as part of a purposeful and deliberate attempt . . . to suppress dissent within the union," 456 U.S. at 441. The instant case does not fit within that narrow exception.



The record below contains no evidence that the petitioners (defendants in the district court), or any of them, were engaging in a course of conduct aimed at stifling dissent within the union. In the absence of proof of a pervasive dissent-stifling policy of the kind required to establish a *Schonfeld* exception to the general rule, the panel majority below simply posited the proposition that an *elected* union official speaks "as a representative of those members who elected him" and concluded that the dismissal of such an official based on his speech, establishes a *per se* violation of the LMRDA. The court of appeals' decision states: "Allowing the removal of an elected official for exercising his free speech right would in effect nullify a member's right to vote for a candidate whose views he supports." Pet. App. at 11a n.7.

The short of the matter is, then, that whereas this Court in *Finnegan* held that a member's removal from an *appointed* office for his exercise of LMRDA rights of speech does not, *without more*, constitute a violation of the Act, i.e., does not constitute "a purposeful and deliberate attempt to suppress dissent," the panel majority below in the instant case reached a diametrically opposite conclusion with respect Lynn's removal from an *elected* office. The majority below acknowledged that the rule applied in this case is limited to the context of elected officers and, indeed, expressly declined to "address the question of when removal from appointive office, in an attempt to suppress dissent, violates Section 102 [of the LMRDA]." Pet. App. at 8, n.4.

2. Once it has recognized that, as just shown, the panel majority below articulated a special rule to govern the removal of elected, as distinguished from appointed, union officers, respondent's attempt to reconcile the decision in this case with the Fifth Circuit's decision in

*Adams-Lundy*, *supra*, collapses of its own weight. The central point of *Adams-Lundy* is that elected officers are *not* "afforded broader protection under § 102 than are appointed officers." 731 F.2d at 1159. The Fifth Circuit, indeed, specifically rejected the theory underlying the decision here: whereas the panel majority below reasoned that the removal of an elected officer necessarily constitutes suppression of dissent because the elected officer "is speaking . . . as a representative of those members who elected him," the Fifth Circuit in *Adams-Lundy* concluded that "the fact that the removed officer was elected by the membership will not suffice to create jurisdiction under the LMRDA," 731 F.2d at 1159.

For like reasons, the decision below cannot be squared with the Eleventh Circuit's decision in *Dolan*, *supra*. As explained in our petition (at p. 8), the Eleventh Circuit in *Dolan* drew a distinction between "membership speech," *i.e.*, speech of a union officer *qua* member, and "officer speech" *i.e.*, speech of an officer *qua* officer. The court below expressly declined to "adopt the Eleventh Circuit's approach," Pet. App. at 10a n.5, and in essence ruled that the speech of an elected officer is always membership speech for which the officer-member can never be discharged.

In sum, as Judge Kennedy stated in his dissent below, "the other circuits faced with determining the applicability of *Finnegan* to removals of elected union officials" have recognized that the fact that a union official is elected "does not transform the allegations of ouster from office into a claim for infringement of membership speech." Pet. App. at 25a-26a. The panel majority reached the opposite conclusion. Accordingly, contrary to respondent's contention, there is a square conflict among the circuits that warrants review by this Court.



## CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

No. 86-1940

# In the Supreme Court of the United States

OCTOBER TERM, 1987

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, ET AL., PETITIONERS

*v.*

EDWARD LYNN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether an elected union official's removal from office in retaliation for his expression of views on matters of union governance, which removal is part of a purposeful and deliberate attempt to suppress dissent within the union, gives rise to a cause of action under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 412.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 86-1940

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, ET AL., PETITIONERS

*v.*

EDWARD LYNN

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. Petitioners are two labor organizations, an international union and one of its locals,[1] that are subject to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. (& Supp. III) 401 *et seq.* Title I of the LMRDA gives members of labor organizations certain rights, including "equal rights and privileges * * * to

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[1] Petitioner Local 75 was dissolved effective March 1, 1985. Two other locals, not parties below or before this Court, apparently have joint responsibility for Local 75's liabilities and other legal obligations. See Pet. App. 6a n.2.

nominate candidates, [and] to vote in elections" (§ 101(a)(1), 29 U.S.C. 411(a)(1)) and the rights "to express any views, arguments, or opinions" and "to express at meetings of the labor organization [their] views * * * upon any business properly before the meeting," subject to reasonable union rules. § 101(a)(2), 29 U.S.C. 411(a)(2). Members may sue in federal court to obtain "such relief (including injunctions) as may be appropriate," if these rights are infringed. § 102, 29 U.S.C. 412.

In June 1982, at the request of the officers, business representatives, and the business manager of Sheet Metal Workers' Local 75, and to alleviate the local's financial problems, the international union placed the local under trusteeship (Pet. App. 2a). Under the international's constitution, the trustee had authority " 'to take such action as he deems necessary to protect the interest and welfare of the local' " (*id.* at 33a) including " 'the right to suspend local union or council officers, the business managers, or the business representatives' " (*id.* at 11a-12a).[2] The trustee determined that the solution to the local's financial difficulties was an increase in its membership dues and initiation fee (*id.* at 2a).

Respondent Lynn, who had been elected to a business representative position in the local before the imposition of the trusteeship, opposed these increases at a special membership meeting called to consider them (Pet. App. 2a). The membership of the local, by a narrow vote, rejected the proposed increases (*id.* at 11a n.6). Five days later, the trustee informed respondent that he was being removed from his business representative position indefinitely because of his opposition to the increases and for other actions detrimental to the interests of the union and its membership (*ibid.*).

[2] A local union under trusteeship loses its autonomy and is governed by a trustee who may suspend elections and relieve local officers of their duties. See 29 C.F.R. 452.15. Title III of the LMRDA limits the circumstances under which trusteeships may be imposed and otherwise regulates the manner in which they are conducted. See 29 U.S.C. 461-464. Title III is enforced by both the Secretary of Labor and local union members. 29 U.S.C. 464.



2. Respondent sued both the international and local unions in federal district court. The first of his two claims alleged that removal from his elected position in the local union infringed his free speech rights under Title I of the LMRDA (Pet. App. 3a).[3] The district court, finding no material factual dispute as to the reason for respondent's discharge, granted summary judgment to petitioners on the ground that, as a matter of law, respondent had not alleged a violation of any LMRDA rights (*id.* at 36a). Specifically, the district court held that respondent was removed from office for opposing the trustee's proposed increases at a time when he "was serving in this position at the pleasure of the trustee" (*ibid.*). In these circumstances, the district court concluded that respondent's "§ 411(a)(2) right as a member to speak out on issues involving union affairs was not diminished or impaired by his dismissal from employment as a full-time agent of the local union" (*ibid.*).[4] In so ruling, the district court cited *Finnegan* v.

[3] Respondent also asserted a violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, for breach of a collective bargaining agreement because of an alleged failure to refer respondent to jobs through the local union's hiring hall (see Pet. App. 4a). Both lower courts ruled against respondent on this issue and he did not cross petition for review of those decisions. Respondent also was fined $2,500, apparently in response to his opposition to the trustee's policies (*id.* at 2a-3a). The validity of this fine was not an issue before the court of appeals (see *id.* at 5a) and has not been raised here.

[4] The court also found that respondent's removal did not amount to "discipline" within the meaning of either LMRDA Section 101(a)(5),

*Leu*, 456 U.S. 431 (1982), in which this Court held that the discharge of appointed officials of a local union for opposing the election of a union president did not violate the LMRDA. The court read *Finnegan* as standing for the proposition that "[a] union member's statutory right to oppose union policies affords him no protection against dismissal from employment as an agent of the union because of such opposition" (Pet. App. 36a).

3. A divided court of appeals reversed, holding that "at a minimum, a retaliatory removal from elective office violates Section 102 of the LMRDA when it occurs as 'a purposeful and deliberate attempt * * * to suppress dissent within the union' " (Pet. App. 8a, quoting *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (2d Cir. 1973)). The majority noted the language in *Finnegan* stating that both LMRDA Sections 609 and 101 (29 U.S.C. 529, 411) protect individuals in their status as members, not as officers of the union (Pet. App. 8a-9a). However, citing Section 102 of the LMRDA, which protects "[a]ny person" whose Title I rights are violated, and which this Court noted in *Finnegan* (456 U.S. at 439) "provides independent authority for a suit against a union based on an alleged violation of Title I of the Act," the court of appeals concluded that "under certain circumstances, an official who alleges that union actions have infringed upon his Title I rights may state a cause of action under section 102" (Pet. App. 9a).

The court further concluded that respondent had alleged an infringement of his free speech rights under Section 101(a), 29 U.S.C. 411(a) (Pet. App. 9a-11a). The majority recognized that in this case, as in *Finnegan*, the infringement was only indirect, in that the dismissal made the loss of union office a cost of the exercise of Section 101 rights (Pet. App. 10a-11a). Stating that the *Finnegan* court had not held that only direct infringements of Title I rights were actionable, the court of appeals proceeded to reach the question explicitly raised but not decided in *Finnegan*—whether Title I of the LMRDA places limits "on a union's authority to utilize dismissal from union office as 'part of a purposeful and deliberate attempt . . . to suppress dissent within the union,' cf. *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (CA2 1973) * * *" (456 U.S. at 441).

The court of appeals referred to the LMRDA's " 'overriding objective' " of ensuring " 'that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections' " (Pet. App. 11a (quoting *Finnegan*, 456 U.S. at 441)) and noted that this case involves, not an appointive post that is part of a union patronage system, but "an elected officer who is speaking not only for himself as a member, but also as a representative of those members who elected him" (Pet. App. 11a (footnote omitted)). With these considerations in mind, the court of appeals found that allegations that an elected officer was removed in order to suppress dissent stated a claim under Section 102 (Pet. App. 8a, 11a, 13a).[5] Accordingly, it reversed the

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29 U.S.C. 411(a)(5), or Section 609, 29 U.S.C. 529 (Pet. App. 36a). Section 101(a)(5) makes it unlawful for a labor organization to fine, suspend, expel or otherwise discipline a union member, except for nonpayment of dues, without affording the member certain procedural safeguards. Section 609 makes it unlawful for a labor organization to fine, suspend, expel, or otherwise discipline any of its members for exercising rights protected by the LMRDA.

[5] The court also recognized that respondent's local was under a legitimate trusteeship at the time of his removal and that under the union constitution a trustee had the authority to suspend local business representatives such as respondent (Pet. App. 11a-12a, 13a). The court rejected petitioners' argument, however, that even if respondent's removal from office ordinarily would violate his Title I rights, the removal was properly based on the trustee's authority. The court reasoned that a trustee may not use his powers for "illegitimate

district court's grant of summary judgment and remanded for further proceedings.

Judge Kennedy dissented (Pet. App. 24a-27a), asserting that the majority had misconstrued "whatever exception to its holding the Supreme Court intended to leave open in *Finnegan*" (*id.* at 25a). He argued (*id.* at 26a) that it made no difference that respondent was elected to his office, rather than appointed, and maintained that, "[a]t least absent allegations that his suspension was part of a scheme to subvert the union's basic democratic structure * * * the injury suffered by Lynn [was] primarily connected with his status as an officer, not a union member, and does not support a claim under the LMRDA" (*id.* at 26a-27a).

## DISCUSSION

The court of appeals remanded this case to the district court, which evidently is to determine whether respondent suffered "a retaliatory removal" that was " 'a purposeful and deliberate attempt * * * to suppress dissent within the union' " (Pet. App. 8a (citation omitted)).[6] In holding that such a removal of an elected union official would constitute a violation of Title I rights, the Ninth Circuit did not depart from either this Court's decision in *Finnegan* or from the emerging consensus among the courts of appeals. While it is unclear whether significant discord ultimately

purposes," such as "retaliation for the exercise of a right protected by the LMRDA" (*id.* at 13a).

[6] In reversing the district court's grant of summary judgment for petitioners, the court of appeals found that respondent "alleged a cause of action under section 102" (Pet. App. 11a), and remanded the case to the district court "for further proceedings" (*id.* at 23a). While the court was not explicit in defining the task before the district court, it necessarily requires a determination whether the undisputed facts, or the facts as found after a hearing, present a violation of Section 102 as that provision was construed by the court of appeals.



will emerge on the existence and proper limitations of exceptions to the *Finnegan* rule, no clear disagreement exists at the present time, and certainly the holding of the Ninth Circuit in this case does not conflict with that of any other court of appeals. Moreover, the holding of the court below, if not every phrase of its opinion,[7] appears to embody a faithful reading of this Court's opinion in *Finnegan*. Accordingly, the petition for a writ of certiorari should be denied.

1. a. When a union's adverse action against one of its officials is challenged under Section 102 of the LMRDA, analysis properly begins with this Court's decision in *Finnegan* v. *Leu*, 456 U.S. 431 (1982). In *Finnegan*, the newly elected President of a union local, acting pursuant to the local's bylaws, discharged appointed union business agents who were political supporters of the incumbent he had just defeated and replaced them with appointees loyal to himself (456 U.S. at 433-434). The former business agents brought an action in federal district court under Section 102 of the LMRDA,[8] claiming that their discharge violated Sections 101 and 609 of the LMRDA, 29 U.S.C. 411, 529. Section 101 "guarantee[s] equal voting rights, and rights of speech and assembly, to '[e]very *member* of a labor organization' (emphasis added)" (456 U.S. at 436 (footnote omitted), quoting Section 101); Section 609 "renders it unlawful for a union or its representatives 'to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled

[7] See note 11, *infra*.

[8] Section 102, 29 U.S.C. 412, states in pertinent part:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. * * *

under the provisions of this Act.' (Emphasis added.)" (456 U.S. at 436 (footnote omitted), quoting Section 609).

After emphasizing (456 U.S. at 435-437) that the LMRDA protects individuals in their capacity as union members, not union officers, the Court held that discharge from office is not "discipline" within the meaning of Section 609, which does not "establish a system of job security or tenure for appointed union employees" (456 U.S. at 438). The Court found it "evident," however, "that a litigant may maintain an action under § 102—to redress an 'infringement' of 'rights secured' under Title I—without necessarily stating a violation of § 609" (*id.* at 439 (quoting Section 102)).

In analyzing the alleged infringement of the discharged officers' Title I rights, the Court noted that only an indirect interference was asserted: the officers had to choose between exercising their rights of free expression and retaining their union jobs (456 U.S. at 440). The Court then said (*id.* at 440-441 (footnotes omitted)):

> We need not decide whether the retaliatory discharge of a union member from union office—even though not "discipline" prohibited under § 609—might ever give rise to a cause of action under § 102. For whatever limits Title I places on a union's authority to utilize dismissal from office as "part of a purposeful and deliberate attempt . . . to suppress dissent within the union," cf. *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (CA2 1973), it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own. Indeed, neither the language nor the legislative history of the [LMRDA] suggests that it was intended even to address the issue of union patronage. * * * Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.



The Court also specifically held open the question "whether a different result might obtain in a case involving nonpolicymaking and nonconfidential employees" (*id.* at 441 n.11).

b. Since *Finnegan*, three courts of appeals have specifically addressed the applicability of Section 102 to indirect interference with Title I rights that takes the form of dismissal from union office: the Fifth Circuit (*Adams-Lundy* v. *Ass'n of Professional Flight Attendants*, 731 F.2d 1154 (1984)); the Second Circuit (*Cotter* v. *Owens*, 753 F.2d 223 (1985)); and the Ninth Circuit in this and another case (*Brett* v. *Hotel Union, Local 879*, 828 F.2d 1409 (1987)).[9]

[9] Two other courts of appeals have dealt with actions under Title I challenging dismissal of union officers. In *Dolan* v. *Transport Workers Union*, 746 F.2d 733 (1984), the Eleventh Circuit reversed a jury verdict in favor of a plaintiff who had been removed from her elected position as President of a union local. The court ruled that the jury instructions incorrectly allowed a verdict for plaintiff where the action against her was taken in retaliation for "officer speech"—which it found to be unprotected under Title I of the LMRDA—as distinguished from "member speech" (746 F.2d at 741-743). The court of appeals also indicated that the case before it involved "individual officers' claims concerning their own membership speech rights," and that it was leaving to "another day" the questions presented by "[a]llegations that discharge of an officer was 'part of a purposeful and deliberate attempt to suppress dissent within the union.' * * * *See Finnegan, supra*, 102 S. Ct. at 1873 *quoting Schonfeld* v. *Penza*, 477 F.2d 899, 904 (2d Cir. 1973)" (746 F.2d at 742 n.17). The court thus did not decide the issue resolved by the Ninth Circuit here—whether Title I rights can be violated by the removal of a union officer as a part of a deliberate attempt to suppress dissent among union members.

In *Sullivan* v. *Laborers' Int'l Union of North America*, 707 F.2d 347 (1983), the Eighth Circuit addressed the related issue of the applica-

In the first appellate decision following *Finnegan*, the Fifth Circuit in *Adams-Lundy* stated that union actions against elected officers which are aimed at stifling dissent and suppressing union reform efforts could constitute a violation of Section 102, but found no such violation presented on the facts before it (731 F.2d at 1158). In sketching the requirements of a valid suppression-of-dissent claim, the Fifth Circuit stressed that plaintiffs must show "that their suspension was part of a scheme to subvert the union's basic dem- :ratic structure or otherwise directly implicated rights of members" (*id.* at 1159). It then found that plaintiffs had "not seriously attempted to carry [their] burden" because there was no "claim or proof that the defendants [were] attempting to dismantle the union's electoral system, nor that members opposing that faction [were] in any fashion suppressed or threatened with reprisals" (*ibid.*). The Fifth Circuit specifically rejected the suggestion that a dismissal of an elected officer automatically infringes the voting rights of those who elected him (*ibid.*).

In *Cotter* v. *Owens*, the Second Circuit was presented with a plaintiff who "sought to prove that his removal [from a union committee] was part of an over-all scheme to suppress dissent, by detailing the history of past and present litigation between his dissident group, or its

---

bility of Section 101(a)(5) of the LMRDA (29 U.S.C. 411(a)(5)) to a dismissal from union office and an order preventing a member from being elected to office. Section 101(a)(5) provides procedural protections to union members who are "fined, suspended, expelled, or otherwise disciplined." The Eighth Circuit, relying on *Finnegan*, held that removal from office is not discipline within the meaning of Section 101(a)(5), but that revocation of a member's eligibility to be elected is discipline (707 F.2d at 350). *Sullivan* does not deal with the substantive rights to free expression which are at issue in this case, which arise under Section 101(a)(1) and (2).



precursors, and the union leadership" (753 F.2d at 229). The court decided that its earlier decision in *Schonfeld* v. *Penza, supra*, quoted by this Court in *Finnegan* (456 U.S. at 441), retained its vitality, and found a genuine issue of fact "as to whether the removal of Cotter from the Committee was not merely an isolated act of retaliation • • •, but was part of a 'purposeful and deliberate attempt to suppress dissent within the union' " (753 F.2d at 230 (quoting *Schonfeld*, 477 F.2d at 904)). The Second Circuit therefore remanded the case to the district court to determine whether plaintiff's removal "was part of a broader anti-democratic scheme" (753 F.2d at 230).

The Ninth Circuit decisions in the present case and in *Brett* are the most recent court of appeals discussions of the existence and scope of a suppression of dissent exception to the rule announced in *Finnegan*. In *Brett*, the court affirmed a verdict and award to an elected union steward who was removed from her position. The court was careful to note that it was not holding that "an elected official always has a cause of action," and repeated the holding of *Lynn*—"that at a minimum an elected official has a cause of action when he or she suffers a retaliatory removal which occurred as a purposeful and deliberate attempt to suppress dissent within the union" (828 F.2d at 1416 n.11). Based on the facts developed at trial, the court found that the jury reasonably could have determined "that the Union engaged in a deliberate, purposeful attempt to suppress dissent within the Union • • • and that Brett's removal was part of that campaign" (*id.* at 1416). The evidence in *Brett* included a showing that the union had "done everything it could, including several acts judicially determined to be illegal" to thwart the leadership ambitions of a close political ally of Brett's (*ibid.*).

All three courts of appeals that have addressed the issue of indirect interference with Title I rights since *Finnegan*

thus agree that adverse actions relating to officer status can give rise to a cause of action under Section 102 where their purpose is the suppression of dissent within the union. In addition, all of those courts have indicated (*Adams-Lundy*, 731 F.2d at 1159; *Cotter*, 753 F.2d at 230; *Brett*, 828 F.2d at 1416-1417) that in order to be actionable the suppression must take the form of a concerted program, rather than just an isolated instance of retaliation, and the Fifth Circuit (*Adams-Lundy*, 731 F.2d at 1158) has suggested that a threat to "the democratic character of the union" may be relevant. No court has rejected the proposition that Section 102 can provide a remedy where officers are sanctioned in order to stifle members' dissent.

2. We believe that the courts of appeals have correctly sketched the outlines of the Section 102 enforcement provision as it relates to actions against union officers, and that there is no reason that those courts should not be left to elaborate more fully the proper operation of that statute.

The courts of appeals' consistent recognition of a Section 102 remedy for dismissal of officers as part of an effort to suppress dissent accords with both the language of the statute and the explicit reservation of the issue in *Finnegan*. Although such removals present only an indirect affront to Title I rights by imposing a cost on their exercise, the courts of appeals' interpretation is fairly encompassed by the language of the statute, which refers to rights being "infringed" (§ 102, 29 U.S.C. 412). It is common to talk of a right being infringed without being eliminated. We know of no indication in the legislative history that Congress's purpose of protecting the rights created by Title I was limited to direct deprivations of those rights and did not include more subtle schemes that have as their object the curtailment of union democracy.



The courts of appeals have also properly found that a purpose of suppressing dissent and an over-all program of suppression are necessary conditions of a cause of action under Section 102. The requirement of an anti-democratic purpose accords with *Finnegan*, which noted explicitly that the local President's actions had put a price on the exercise of protected rights, but found that burden permissible because it served the justifiable purpose of allowing an elected officer freedom "to choose a staff whose views are compatible with his own" (456 U.S. at 441 (footnote omitted)). It is a familiar aspect of intent-based standards that a particular action—here, dismissal of an officer—can be proper or improper depending on its objective. Moreover, the question explicitly left open in *Finnegan* was whether " 'purposeful' " suppression of dissent would be actionable. Similarly, Section 102 is best read as providing a remedy for concerted programs of suppression, rather than isolated instances of retaliation. A program requirement will focus the remedy on those situations where the underlying value of union democracy is most clearly and seriously threatened, while limiting judicial intrusions into the union automony that the LMRDA is designed to preserve. The details of the purpose and program elements can best be worked out through further litigation in the lower courts.

We also agree with the apparent consensus among the courts of appeals that (except as an evidentiary matter in certain cases[10]) the availability of a Section 102 action

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[10] For example, if an elected officer were dismissed in conjunction with an explicit threat that there would be further retaliation against all his supporters, then the officer's status "as a representative of those members who elected him" (Pet. App. 11a) could be probative of a program to overthrow union democracy. Similarly, the fact that an officer was appointed by and hence possibly an agent of, another officer of the union could, in an appropriate case, indicate that a

does not turn on whether the officer who is discharged or otherwise sanctioned was appointed or elected.[11] The conflicting lines of authority that were resolved by *Finnegan* included cases involving both kinds of officers (see 456 U.S. at 433 & n.1), and *Finnegan* made no suggestion that either its rule or the possible exception involving suppression of dissent depended on a distinction between elective and appointed office. Such a distinction would rest on the conclusion that a member's Title I rights include freedom from interference with the tenure of union officers for whom he has voted. However, tenure of office—including the circumstances justifying removal—is defined by applicable union rules and federal law, and the right to have one's candidate remain in office should not entail any additional protections of an officer's tenure. While any attempt directly to interfere with the right to vote would be actionable under Section 102, that provision should not be construed to provide a remedy for the indirect interference with voters' rights that arises when an elected official is removed from office (see *Adams-Lundy*, 731 F.2d at 1159).

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removal rested on legitimate considerations of union governance of the sort approved in *Finnegan*, rather than an impermissible anti-democratic purpose.

[11] This is not to say that the Ninth Circuit's opinions in this case and in *Brett* do not contain passages which might be read in isolation to attach great significance to an officer's elected status. "[T]he removal of an elected official for exercising his free speech rights would in effect nullify a member's rights to vote for a candidate whose views he supports" (Pet. App. 11a n.7); see *Brett*, 828 F.2d at 1415-1416. We think it clear from a full reading of both opinions, however, that neither holds elected status to be either a necessary or a sufficient condition of an action under Section 102 for removal of a union officer.



In view of the general agreement that appears to be emerging among the courts of appeals, the interest in nationwide uniformity does not at present call for a resolution by this Court.[12] Moreover, the difficult distinction between the political defeat of a minority within a union—with its accompanying loss of positions among the officer ranks—and actions taken to institutionalize that defeat by impairing the operation of union democracy, will be further illuminated through the litigation of additional cases in the lower courts.

---

[12] The Ninth Circuit in this case found unhelpful the Eleventh Circuit's distinction in *Dolan* between officer speech and member speech (Pet. App. 10a n.5). Judge Kennedy agreed that it is "unnecessary and problematic" (*id.* at 26a). The majority noted, however, that its decision would have been the same even employing the Eleventh Circuit's distinction, since it was not plausible to suggest that respondent's opposition to the dues increase could have been understood as officer speech (*id.* at 10a n.5).

## CONCLUSION

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
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FEBRUARY 1988

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# JOINT

# APPENDIX

(5)



No. 86-1940

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,

*Petitioner,*

v.

EDWARD LYNN,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED JUNE 4, 1987**
**CERTIORARI GRANTED MARCH 21, 1988**

53 pp

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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No. CU 83-7146-AWT (Kx)

EDWARD LYNN,
*Plaintiff,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL UNION NO. 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Defendants.*

---

**DOCKET ENTRIES**

| DATE | | PROCEEDINGS |
|---|---|---|
| 11/3/83 | ac | 1. Cplt. Issd sums. Case may be ref for disc to Mag Kronenberg. |
| | | 2. Appl for assgnmt und the low number rule. |
| 12-5-83 | lpc | 3. ANSWER—Sheet Metal Wrkers INTL Assn |
| 12-7-83 | lpc | 4. ANSWER TO COMPLT—Local 75 |
| 12-7-83 | lpc | 5. Notc of tkg depo of E. Lynn 12-20-83—Defendant |
| 12-16-83 | lpc | 6. 1ST AMD ANSWER & COUNTER-CLM—Local 75 |
| 12-21-83 | lpc | 7. ORD allowg apprnc of non-res atty D. Fisher to appr desig J. Reich as local cnsl—deft |

| DATE | | | PROCEEDINGS |
|---|---|---|---|
| 12-28-83 | lpc | 8. | Rept of early mtg of cnsl—Plaintiff |
| 1-19-84 | lpc | 9. | ANSWER to COUNTERCLAIM—pltf |
| 2-1-84 | lpc | 10. | Opp to mot fr dmt on pldngs—pltf |
| | | 11. | Notc ofmot & mot frjdmt on pltds 2-27-84, 10AM—Local 75 |
| 2-7-84 | lpc | 12. | Reply in suppt ofmot for jdmt on pldngs —local 75 |
| 2-10-84 | sm | 13. | Joint reprt of early meetng of cnsl. |
| 3-1-84 | am | | LODGED depo of Edward Lynn tkn 12-20-83 |
| 3-1-84 | am | | LODGED depo of Edward Lynn tkn 12-21-83 |
| 2-27-84 | am | 14. | ORD the defts motn denied. MO |
| 3-12-84 | am | 15. | Notc of motn & motn for s/j retrnbl 3-2-84, 10AM; P&As deft |
| 3-12-84 | am | | LODGED prop stmt of fact & concl of law |
| 3-12-84 | am | | LODGED prop jdmt |
| 3-8-84 | am | 16. | Brf of deft Sht Metl Wrks' Intrntl Assoc, AFL-CIO in suppt of mot for prtl s/j |
| 3-8-84 | am | 17. | Deft Intrntl's notc of motn for prtl s/j on 4-2-84, 10AM |
| 3-8-84 | am | | LODGED stmt of fct & concl of law |
| 3-8-84 | am | | LODGED prop s/j |
| 3-8-84 | am | | LODGED prtl s/j |
| 3-8-84 | am | 18. | Deft Intrntnl's motn for prtl s/j |
| 3-8-84 | am | 19. | Deft Intrnatnl's notc of lodg or transc |



| DATE | | | PROCEEDINGS |
|---|---|---|---|
| 3-8-84 | am | 20. | Notc PTC retrnbl 8-27-84 at 1:30PM & Sched ORD for disc cutoff on 7-27-84 |
| 3-19-84 | am | 21. | Genu iss of matrl fact—pltf |
| | | 22. | Opp to mot fr partial S/J—ptlf |
| | | 23. | Opp to mot fr S/J—pltf |
| | | 24. | X-Mot & ntoc of x-mot for partial S/J—pltf |
| 3-21-84 | lpc | 25. | Reply in suppt of mot fr partial S/J—Sheet Metal Wrkrs loc 75 |
| | | 26. | Reply in suppt of mto for S/J—Local 75 |
| 3-28-84 | am | 27. | Rep brief to deft Intrntl's suppl brief in suppt of motn for s/j pltf |
| 3-28-84 | am | 28. | Rep brief to deft Local 75's suppl brief in suppt of motn for s/j pltf |
| 4-2-84 | am | 29. | ORD deft's motn for prtl s/j grntd & deft loc Union motn tkn und subm; pltf's motn for prtl s/j den MO |
| 4-4-84 | kw | 29. | Statment of uncontroverted Facts & Conclusions of Law Defendant |
| | | 30. | ORD defts' mot fr partl S/J GRANTED & pltf mot DENIED; pltf 1st cause of actn dism or the merits. (ENT 4-9-84) mld cpys |
| 4-5-84 | kw | 31. | Statement of uncontroverted Facts & Conclusions of Law Defendant |
| | | 32. | Admnt mot of Local Union #75, Sheet Metal Workers' Intl. fr S/J against Edward Lynn is GRANTED & pltf actn is dism as against Local #75; This dismi is w/o prej to any subsequent actn aftr contractual & internal Union remedies hav been exhausted |

| DATE | | | PROCEEDINGS |
|---|---|---|---|
| | | | or pltf can mak a showing shy such exhaustion shld not be req. (ENT 4-9-84) mlc cpys |
| 4-17-84 | am | | LODGED prop bill of costs |
| 4-17-84 | am | | LODGED prop memo of P&As in suppt of bill of costs deft |
| 5/4/84 | clh | 33. | Fld Pltf's NOTC OF APPEAL to the 9th Cir C/A frm Ord ent on 4/9/84. Paid $70.00 filing and docket fee. |
| 4/17/84 | clh | 34. | Pltf's BILL OF COST in the amount of $1,036.05. Taxed costs in sum of $1,036.05, against pltf. |
| 5/9/84 | clh | 35. | Fld deft's memo fo pts and authorities in suppt of bill of costs. |
| 5/17/84 | clh | 36. | Fld transcript desidgnation and ordering form. |
| 6/5/84 | clh | | Fld transc of procdng had on 4/2/84. |
| 6/25/84 | clh | | Lodged Ord frm USCA re pre-briefing schedule. |
| 8/13/84 | clh | | Lodged Ord frm USCA DISMISSING the appeal for alck of jurisdiction. |
| 8-21-84 | cy | 37. | MIN. ORD. Crt ORDS judgmt of USCA, 9th Cir. dismg the appeal fld & spread. No appear. of counsel requid. (ENT 9-5-84) cpys to ptys. |
| 8-31-84 | mb | | LODEGED ORD cc—The appeal from the District Ct is dismissed for lack of jurisdiction. |
| 9-10-84 | sb | 38. | Notc of filing & spreading judgment appeal dism lack of prsctn (ENT 9-18-84) Mld cpy |



| DATE | | | PROCEEDINGS |
|---|---|---|---|
| 9-24-84 | am | 39. | MO: Crt ORD cntrclaim by Local Union No. 75 dsmsd; furth ORD remaindr of complt dsmsd for pltf's failr to comply w/osc & LR (ENT 9-28-84) Mld cpys & ntcs |
| *9-11-84 | db | 40. | Notc of non-oppos to dismsl of cntrclm. atty for cntrclmnt JS-6 |
| 10/17/84 | avm | 41. | Pltf's NOTC OF APPEAL to 9th Cir. C/A frm jdmt ent 4/9/84 & ord dismng ent 9/28/84. $70.00 fing & doc fee pd. |
| 11-28-84 | mb | | —Fld orig rprtr's transc of proceedings had on 9-24-84. |
| 12-17-84 | mb | 42. | Fld transc desig & ordrng form. |
| 2-19-85 | mb | 43. | Fld desig of trial court clk's record. |
| 3/25/85 | h | 44. | Design of Clerk's record. defts. |
| 4/11/85 | avm | | LODGED cc ord frm 9th Cir. C/A granting aples motn to supplement the desig of clk's recd. |
| 4/19/85 | avm | 45. | Suplemntl desig of clk's recd on appeal deft/aple. |

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

No. CV 83-7146-AWT(Kx)

EDWARD LYNN,
*Plaintiff,*
vs.
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL UNION NO. 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Defendants.*

---

**COMPLAINT FOR DAMAGES AND INJUNCTIVE FOR WRONGFUL REMOVAL OF PLAINTIFF AS A UNION OFFICER AND FAILURE TO DISPATCH FOR WORK UNDER THE COLLECTIVE BARGAINING AGREEMENT UNDER 29 U.S.C. §§ 185 et seq. and 411 et seq.**

---

Plaintiff alleges:

JURISDICTION

1. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1337, and 29 U.S.C. §§ 185 and 412.

VENUE

2. The acts complained of herein occurred within the County of Los Angeles and the parties hereto reside in, or are doing business within the Central District of California.

PARTIES

3. Plaintiff, EDWARD LYNN, is a resident of Orange County and at all times relevant herein was, and



is, a member in good standing of defendants Sheet Metal Workers' International Association and of Local Union No. 75.

4. Defendant, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and defendant, LOCAL UNION NO. 75 of the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, are unincorporated labor organizations representing employees in an industry affecting commerce as defined in 29 U.S.C. §§ 152(5), 142(1) and (3), 185, and 402(i).

NATURE OF ACTION

5. This is an action for damages in the form of lost wages, salary, and fringe benefits for the unlawful removal of plaintiff from his duly elected office and thereafter refusal to dispatch plaintiff according to his seniority to work under the collective bargaining agreement. This is also an action for injunctive relief to prevent defendants from removing plaintiff from his duly elected office and to require defendants to abide by the collective bargaining agreement in dispatching plaintiff according to the terms thereof and according to his seniority to available work.

FIRST CAUSE OF ACTION AGAINST THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 29 U.S.C. §§ 401 et seq.

6. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 5 by this reference as though fully set forth.

7. Early in 1982, and for some time prior thereto, plaintiff was a duly elected Business Representative of Local Union No. 75 of the Sheet Metal Workers' International Association, and was instrumental in forming

the Sheet Metal Club Local No. 75—an organization comprised of members of Local Union No. 75 who were critical of the expenditures by local union officers. Plaintiff and other members of the Sheet Metal Club spoke out at union meetings against dues increases and proposed that the local union officers reduce expenses instead, bringing expenses more in line with other Sheet Metal Workers' Local Unions in the area. The Sheet Metal Club published to the membership reports taken from the LM-2 reports filed with the U.S. Department of Labor as required under the Labor-Management Reporting and Disclosure Act of 1959, the Act. A copy is attached hereto as Exhibit A and incorporated herein by this reference as though fully set forth.

8. Plaintiff and the Sheet Metal Club Local 75 were successful in defeating three attempts to increase dues leading to the officers of Local Union No. 75 requesting defendant "take whatever action you deem necessary including, but not limited to, trusteeship to put this local on a sound financial basis," as more clearly shown by Exhibit "B," which is incorporated herein by this reference as though fully set forth. Plaintiff concurred in this request believing the defendant would reduce expenditures.

9. On or about June 22, 1982, defendant's General President, Edward J. Carlough, placed Local 25 in trusteeship, designating defendant's Regional Director, Richard Hawkins, as trustee as more clearly shown by Exhibit "C," incorporated herein by this reference as though fully set forth.

10. On or about July 29, 1982, defendant's trustee, Richard Hawkins, removed plaintiff from his duly elected office, without providing him with written specific charges, without giving him time to prepare a defense, and without providing him with a full and fair hearing as required by 29 U.S.C. § 411(a)(5) and § 529, as more



clearly shown by Exhibit "D," incorporated herein by this reference as though fully set forth.

11. The true reasons for plaintiff's removal from office were that he engaged in freedom of speech and assembly as guaranteed by 29 U.S.C. § 411 (a)(2), as more clearly shown by purported "charges" filed against plaintiff by trustee Hawkins on or about August 9, 1982, set forth at Exhibit "E" incorporated herein by this reference as though fully set forth.

12. Plaintiff has spent over four (4) months exhausting internal hearing procedures to correct this unlawful discipline and removal from office to no avail as required by 29 U.S.C. § 411(a)(4) thus conferring jurisdiction on this Court under 29 U.S.C. § 412.

13. As a direct and proximate cause of this unlawful discipline and removal, plaintiff has suffered lost salary and fringe benefits he otherwise would have earned as the duly elected Business Representative of Local 75.

14. Defendant's actions were wanton, wilfull, and in reckless disregard of plaintiff's rights under the Act in that:

a. Defendant knew that such summary removals were unlawful under the Act and after plaintiff's appeals had ample opportunity to correct their impetuous acts but refused to do so;

b. Defendant knew that plaintiff had an absolute right under the Act to freedom of speech and assembly and to speak out at union meetings for and against agenda matters;

c. Defendant knew that by disciplining plaintiff, others in disagreement with the trustee and union officers would be intimidated and stifled in speaking out against misuse of union funds,

d. Defendant believed that through economic coercion, plaintiff would be forced to abandon his oppposition to the dictates of the trustee and union officers; and

e. Defendant sought to use plaintiff as an example to others who might speak out in opposition to the dictatorial powers coveted by the trustee and union officers in derogation of democratic procedures guaranteed by defendant's own Constitution and Ritual as well as the Act under 29 U.S.C. § 463. Plaintiff is thus entitled to punitive damages from defendant.

15. Plaintiff has been required to retain the services of an attorney to protect his rights under the Act and therefore is entitled to reasonable attorney fees.

## SECOND CAUSE OF ACTION AGAINST DEFENDANTS UNDER 29 U.S.C. § 185

16. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 15 by this reference as though fully set forth.

17. At all times relevant herein defendants maintained in force a collective bargaining agreement with employers in the manufacture of sheet metal produces relating to the restaurant industry, covering employees, including plaintiff, in the bargaining unit. Both defendants have copies of the agreement, and for that reason none is attached hereto. The agreement was entered into by defendants for the benefit of the employees in the bargaining unit, and plaintiff, as a member thereof, is accordingly entitled to the benefit of the agreement and to enforce the provisions thereof.

18. Article 23 of the collective bargaining agreement, entitled "Hiring and Dispatching," Section 2(a), provides that employers shall requisition all employees to be employed in the bargaining unit from the local hiring hall of the union. Section 5 of the same article provides that out of work employees whose names appear on the "A" list shall be dispatched first before any other journeyman or member not so listed. Plaintiff's name is carried on the "A" list.



19. Notwithstanding the provisions of the collective bargaining agreement and 29 U.S.C. § 463, plaintiff has been registered as out of work since on or about August 6, 1982, but has not been referred for employment with an employer by the hiring hall operated by the union. Rather, out of work members who are not on the "A" list, and even apprentices, have been referred for employment in preference of plaintiff.

20. Defendants refuse, up to and including the date of filing this complaint, to dispatch plaintiff for employment under the terms of the collective bargaining agreement in accordance with his seniority and listing on the "A" list.

21. Defendants have deprived plaintiff of his rights under the collective bargaining agreement and breached their duty of fair representation owing to plaintiff under 29 U.S.C. § 185.

22. As a direct and proximate result of defendants' action, plaintiff has remained unemployed for over a year, all to his damage in lost wages and fringe benefits.

23. Plaintiff has no adequate or complete remedy at law to correct these wrongs alleged herein unless defendants are enjoined by this Court to prevent their continued refusal to dispatch plaintiff to available work under the collective bargaining agreement.

24. Defendants' acts were wanton, wilfull, and in reckless disregard of plaintiff's rights under the Act as alleged in paragraph 14 herein, and therefore, plaintiff is entitled to punitive damages.

WHEREFORE, plaintiff prays this Court for his First Cause of Action:

1. Damages for lost wages and fringe benefits in those amounts as proved at time of trial;

2. Punitive damages in the sum of $1,000,000.00;

3. For reasonable attorney fees and costs; and

4. Such other and further relief as the Court deems equitable and just.

For his Second Cause of Action:

1. Damages for lost wages and fringe benefits in those amounts as proved at time of trial;

2. For punitive damages in the sum of $1,000,000.00;

3. For reasonable attorney fees and costs;

4. For a permanent injunction restraining defendants, their agents, employees, attorneys, and those acting in concert with them from denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiff to dispatch and referral for employment under the terms of the collective bargaining agreement according to his seniority and standing on the "A" list; and

5. For such other and further relief as the Court deems equitable and just.

Dated: November 1, 1983.

/s/ Bruce M. Stark
BRUCE M. STARK
Attorney for Plaintiff



EXHIBIT A

## SHEET METAL CLUB LOCAL NO. 75

These figures were taken from, U.S. Department Of Labor LM-2 REPORTS of 1980.

| Business Managers of Local Unions | Weekly Expense Account (52 wks) | Weekly Wages (52 wks) | Yearly Total |
|---|---|---|---|
| #509 | $ 16.21 | $652.59 | $34,787.96 |
| #108 | $ 30.00 | $863.50 | $46,462.00 |
| #75 | $165.50 | $985.25 | $59,839.00 |
| Cost per Business Agent for each Local Union in our area. | | | |
| #509 | $ 9.81 | $625.10 | $32,954.96 |
| #108 | $ 30.00 | $767.50 | $41,470.00 |
| #75 | $ 77.69 | $892.00 | $50,445.69 |
| The top office pay for one girl in these Local Unions. | | | |
| #509 | —0— | —0— | —0— |
| #108 | —0— | $391.86 | $20,377.00 |
| #75 | $ 16.50 | $453.00 | $24,416.00 |

You can obtain complete copies of the LM-2 reports on any Local Union at

4334 Federal Building
300 north Los Angles st.
Los Angles, Calif. 90012

This fact sheet is put out by the Sheet Metal Club so again you can make an informed decision.

We are not against a dues increase but, we again feel that changes are necessary at this time.

As you can see some changes are necessary to bring our expenditures in line with other Local Unions in our area.

EXHIBIT B

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 75

12631 E. Imperial Hwy. Building B, Suite 202
Sante Fe Springs, California 90670
(213) 868-3738 and (714) 523-4941

June 12, 1982

Mr. Edward J. Carlough, Gen. President
Sheet Metal Workers' Int'l. Assn.
1750 New York Avenue, N.W.
Washington, D.C. 20006

Dear Sir and Brother:

As reported to you and Cecil Clay, General Secretary Treasurer previously we have held two meetings to raise the dues of the local and each time the meetings were concluded without a dues raise.

We have held the third meeting Saturday, June 12, 1982, and again the membership voted not to raise the dues.

Due to the financial condition of the local and due to the membership refusing to increase the dues, we request that you immediately take whatever action you deem necessary including, but not limited to, trusteeship to put this local on a sound financial basis.

Fraternally,

/s/ Virgil Fox
VIRGIL FOX
Business Manager

/s/ Jesus Ribas
JESUS RIBAS
President

/s/ James Jay Johnson
JAMES JAY JOHNSON
Asst. Bus. Mgr.



/s/ Ray Kuta
RAY KUTA
Vice President

/s/ Robert Bradley
ROBERT BRADLEY
Exec. Bd. Mbr.

/s/ James DeBow
JAMES DEBOW
Exec. Bd. Mbr.

/s/ Richard Enriquez
RICHARD ENRIQUEZ
Exec. Bd. Mbr.

/s/ Robert Hoyt
ROBERT HOYT
Exec. Bd. Mbr.

/s/ Robert Kelley
ROBERT KELLY
Exec. Bd. Mbr.

/s/ Roberto Ponce
ROBERTO PONCE
Exec. Bd. Mbr.

cc: Cecil Clay
Stanley Graydon

/s/ Edward Lynn
EDWARD LYNN
Bus. Representative

/s/ Dewite Garcia
DEWITE GARCIA
Trustee

/s/ Morris Troch
MORRIS TROCH
Trustee

/s/ Thomas L. Wilson
TOM WILSON
Trustee

/s/ Fred Singer
FRED SINGER
Conductor

/s/ Arturo R. Galarza
ARTURO GALARZA
Warden

/s/ Tom Carter
TOM CARTER
Recording Secy.

EXHIBIT C

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

Edward J. Carlough
General President

1750 New York Avenue, N.W.
Washington, D.C.
20006
202/783-5880

Certified Return Receipt Requested

June 22, 1982

Jesus Ribas, President
Sheet Metal Workers Local 75
10425 Lindenvale Road
Whittier, California 90606

Thomas Carter, Recording Secretary
Sheet Metal Workers Local 75
12060 E. Florence Avenue
Santa Fe Springs, California 90670

Dear Sirs and Brothers:

You are hereby advised, that pursuant to the authority vested in me under Article Three (3), Section 2(c) of the International Constitution, I am placing Local Union 75 under Trusteeship effective immediately upon receipt of this letter, and am appointing Regional Director Richard Hawkins as my personal representative with full authority to supervise and direct the affairs of Local Union 75, subject, of course, to my approval.

As of the date or receipt of this Directive, and continuing during the period of the Trusteeship, Local Union 75, the officers, representatives and members, shall take no official action without my approval or that of Regional Director Richard Hawkins, who has authority to act for me.

Regional Director Hawkins shall have authority to take such action as he deems necessary to protect the interest and welfare of Local 75, its funds, property and membership and the interest and welfare of the International Association. His authority includes, but is not limited to, the right to suspend local officers, the Business Manager,



and/or the Business Representatives, to fill vacancies in such positions, or offices by appointment or special election or to leave such positions or offices vacant, to hire or discharge any clerical, professional, or legal personnel, or to empound and/or audit the books, records and property of Local Union 75. He shall submit a report on the affairs of Local Union 75 to the General Office within thirty (30) days from the receipt of this letter.

This action is based upon the following:

1. The membership of Local Union 75 is beset with factional strife to the extent that it is unable to conduct its affairs properly and carry out its functions as a subordinate unit of the International Association.

2. The internal strife has been primarily responsible for the precarious affect on the financial condition of the local union which has dropped from approximately a quarter of a million dollars to approximately ninety ($90) thousand dollars in less than a year and a half and if permitted to continue, will be detrimental to the best interest of the local union and the International Association.

3. The internal strife is making it impossible for the Business Manager and/or Business Representative of the local union to properly administer the provisions of the collective bargaining agreements and to otherwise comply with obligations imposed upon the local as a collective bargaining representative.

The matters referred to above plainly indicate to me that some officers and members of Local 75 are conducting its affairs in a manner detrimental to the best interests of the local union and of the International Association. By their actions, they have already brought and will continue to bring Local 75 and the International Association into disrepute with the public, with the labor movement in the locality and with its own membership.

It is my hope and expectation that the affairs of Local Union 75 will be restored to proper order promptly through the action I have taken and I am conndent of receiving full support from the officers and members in this endeavor.

If it becomes necessary, my action will be reviewed and either ratified or rejected in accordance with the provisions of Article Three (3) Section 2(c) of the International Constitution by a Sub-committee of the General Executive Board.

Fraternally yours,

/s/ Edward J. Carlough
EDWARD J. CARLOUGH
General President

EJC/med

cc: Hawkins
Fox
Graydon
Walck w/file



EXHIBIT D

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
729 N. California Street
Stockton, California 95202
Phone: (209 463-9043

RICHARD G. HAWKINS
Regional Director of Organization
Region No. 4

July 29, 1982

Mr. Edward Lynn, Bus. Rep.
Sheet Metal Workers Local #75
1315 Eltham Place
Fullerton, Ca. 92633

Dear Sir and Brother:

As Trustee of Sheet Metal Workers Local 75 I am exercising my authority under Article 3, Sec. 2(c), Paragraph two: "DURING TRUSTEESHIP OF ANY LOCAL UNION OR COUNCIL, THE GENERAL PRESIDENT SHALL HAVE AUTHORITY TO TAKE SUCH ACTION AS HE DEEMS NECESSARY TO PROTECT THE INTEREST AND WELFARE OF SUCH LOCAL UNION, COUNCIL AND THIS ASSOCIATION, AND THE FUNDS, PROPERTY AND MEMBERSHIP THEREOF, INCLUDING, BUT NOT LIMITED TO, THE AUTHORITY TO SUSPEND LOCAL UNION OR COUNCIL OFFICERS, BUSINESS MANAGERS, OR BUSINESS REPRESENTATIVES, FILL VACANCIES IN SUCH OFFICE WITH ANY REPRESENTATIVES OF THIS ASSOCIATION OR MEMBERS OF SUCH LOCAL UNION, OR CALL ELECTIONS FOR THAT PURPOSE, AND IMPOUND THE BOOKS, RECORDS, FUNDS AND THE PROPERTY OF ANY SUCH LOCAL UNION OR COUNCIL."

This is to advise you that upon receipt of this communication I am removing you from office indefinitely. You are to return all records or anything in your possession that belongs to the Local Union, i.e., office keys, automobile, credit cards, etc. in accordance with your oath of office, ". . . . THAT I WILL DELIVER TO MY SUCCESSOR ALL BOOKS, PAPERS, MONIES, OR OTHER PROPERTY OF THIS LOCAL UNION WHICH MAY BE IN MY POSSESSION AT THE CLOSE OF MY OFFICIAL TERM, ALL IN ACCORDANCE WITH THIS PLEDGE AND OBLIGATON TAKEN."

This action is necessary due to various actions you have taken which are detrimental to the International Association and Local Union #75 and your refusal to support the officers of Local 75 in their efforts to comply with Article 10, Sec. 2(f), "EACH LOCAL UNION SHALL ESTABLISH AND MAINTAIN A MONTHLY OR QUARTERLY RATE OF DUES SUFFICIENT TO CARRY ON THE AFFAIRS OF SUCH LOCAL UNION ON A SOUND FINANCIAL BASIS, HAVING IN MIND ITS CURRENT AND PROSPECTIVE NEEDS AND REQUIREMENTS AND ITS OBLIGATIONS DUE THIS ASSOCIATION, INCLUDING MONTHLY PER CAPITA TAX. THE AMOUNT OF SAID DUES IN NO CASE SHALL BE LESS THAN THOSE PRESCRIBED IN THIS CONSTITUTION. THE DUES OF ALL MEMBERS OF LOCAL UNIONS SHALL BE PAID MONTHLY OR QUARTERLY, BUT ALWAYS IN ADVANCE. FAILURE TO PAY DUES WITHIN TWO (2) MONTHS SHALL RESULT IN AUTOMATIC SUSPENSION FROM MEMBERSHIP."

You will be paid through August 6, 1982, but you are to return all Local Union property no later than the close of the working day of August 5, 1982. I am instructing the financial secretary to pay you three weeks vacation



and two weeks severance pay that I understand you are entitled to.

Fraternally,

/s/ Richard G. Hawkins
RICHARD G. HAWKINS
Reg. Dir.
Trustee of Local 75
Sheet Metal Workers
Int'l. Assn.

RGH:ap

CERTIFIED MAIL
RETURN RECEIPT

cc: Edward J. Carlough, Gen. Pres.
Stanley Graydon
Virgil Fox, Bus. Mgr. L. U. 75
Tom Sarter, Rec. Secy. L. U. 75

EXHIBIT E

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
729 N. California Street
Stockton, California 95202
Phone: (209) 463-9043

RICHARD G. HAWKINS
Regional Director of Organization
Region No. 4

August 9, 1982

Mr. Edward Lynn
Sheet Metal Workers' Local #75
1315 Eltham Place
Fullerton, CA 92633

Dear Sir and Brother:

This is to advise you that I, Richard G. Hawkins, a member of good standing in Sheet Metal Workers' International Association, Local #283, AFL-CIO, Stockton, California, membership #140909, do hereby prefer charges against you a member of good standing in Sheet Metal Workers' Local #75, membership #368035, for violation of Article #17 Sec. (e), 1(m).

1(e) Refusal to dispatch classified members and apprentices upon request from the employer when they are entitled to such employees under the contract.

1(m) As a member of the negotiating committee for the Sign Industry held a meeting without the knowledge of negotiating Committee and programed the employees to vote against a 30 day extension of the contract, and at a special called meeting argued against the 30 day extension, thus causing a strike.



Attending Executive Board meetings, and carrying the results to the 75 Cub and programming actions contrary to the recommendations of the Executive Board.

At a special called meeting to raise the dues he took the floor and argued against the due increase in a belligerent manner, accusing me of not doing anything to solve the problems of the local etc. He did this after he told me he would not support the dues increase, but he would not oppose it.

Causing problems in shops, making it necessary to remove him as Business Representative from two shops, antagonizing the members etc.

Fraternally yours,

/s/ Richard G. Hawkins
RICHARD G. HAWKINS
Trustee #75
Sheet Metal Workers' Int'l Assn

RGH:pj

opeiu: 29

cc: Edward J. Carlough
Cecil Clay

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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No. CV 83-7146-AWT(Kx)

---

EDWARD LYNN,
*Plaintiff,*

v.

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,
*Defendants.*

---

[Filed Dec. 5, 1983]

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**ANSWER OF DEFENDANT SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO**

Now comes Sheet Metal Workers' International Association, AFL-CIO, defendant herein, and for answer to the complaint herein states:

FIRST DEFENSE

In answer to the specific allegations in the various paragraphs in the complaint, this defendant states:

1. The allegations in paragraph 1 consist of conclusions of law which require no answer.

2. The allegations in paragraph 2 are admitted.

3. The allegations in paragraph 3 are admitted.

4. The allegations in paragraph 4 are admitted.



5. The allegations in paragraph 5 consist of characterizations of the theories of recovery in the several causes of action in the complaint which require no answer. However, to the extent that any of said allegations are construed as averments of fact they are denied.

6. The allegations in paragraphs 1 through 5 hereinabove are incorporated by referenced as if set forth verbatim herein.

7. It is admitted that plaintiff was a duly elected business representative of Local Union No. 75 of the Sheet Metal Workers' International Association (International) early in 1982 and for some time prior thereto. The remaining allegations in paragraph 7 are denied for lack of knowledge sufficient to form a belief as to the truth or falsity thereof.

8. It is admitted that the offices of Local Union No. 75 sent a letter dated June 12, 1982, which is attached as Exhibit B to the complaint, to this defendant. The contents of Exhibit B speak for themselves. The remaining allegations in paragraph 8 are denied for lack of knowledge sufficient to form a belief as to the truth or falsity thereof.

9. The allegations in paragraph 9 are admitted.

10. It is admitted that defendant's trustee, Richard Hawkins, removed plaintiff from his position as business representative on or about July 29, 1982 and that Exhibit D to the complaint is a true and correct copy of Hawkins' notification to plaintiff of plaintiff of his removal from said position. It is also admitted that no charges of misconduct were preferred against plaintiff and no trial or hearing held in connection with his removal as business representative of Local Union No. 75. The remaining allegations in paragraph 10, are denied.

11. The allegations in paragraph 11 are denied.

12. It is admitted that plaintiff appealed his removal from the position of business representative and ex-

hausted internal union remedies for more than four (4) months after July 29, 1982. The remaining allegations in paragraph 12 are denied.

13. It is admitted that as a direct and proximate cause of his removal from the position of business representative on or about July 29, 1982, plaintiff was no longer paid the salary of the position nor were fringe benefit contributions made on his behalf by Local Union No. 75. It is expressly denied that his removal from such position was unlawful discipline and the remaining allegations in paragraph 13 are denied.

14. The allegations in paragraph 14 are denied.

a. The allegations in paragraph 14 a are denied.

b. The allegations in paragraph 14b are denied.

c. The allegations in paragraph 14c are denied.

d. The allegations in paragraph 14d are denied.

e. The allegations in paragraph 14e are denied.

15. The allegations in paragraph 15 are denied.

16. The allegations in paragraphs 1 through 15 hereinabove are incorporated by reference as if set forth verbatim herein.

17. It is admitted that Local Union No. 75 negotiated and maintained in force collective bargaining agreements with certain employers that manufacture food service or restaurant equipment. Said agreements speak for themselves. The remaining allegations in paragraph 17 are denied.

18. It is admitted that plaintiff's name appears on the "A" list of the food service industry agreement. Article 23, Section 2(a) of the food service industry agreement speaks for itself. The remaining allegations in paragraph 18 are denied.



19. The allegations in paragraph 19 are denied. Pleading further, this defendant alleges that out-of-work members whose names are not on the "A" list have been referred for employment but that referral of such individuals for employment in "classified" positions is in accordance with the provisions of the applicable collective bargaining agreement.

20. The allegations in paragraph 20 are denied.

21. The allegations in paragraph 21 are denied.

22. The allegations in paragraph 22 are denied.

23. The allegations in paragraph 23 are denied.

24. The allegations in paragraph 24 are denied.

This defendant further denies that plaintiff is entitled to any monetary or injunctive relief against it as prayed for in the First and Second Causes of Action in the complaint herein.

SECOND DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

THIRD DEFENSE

The claim asserted in the Second Cause of Action is premature in that plaintiff has failed to exhaust internal internal union remedies in order to obtain relief therefor.

FOURTH DEFENSE

With respect to the claim asserted in the First Cause of Action, plaintiff's term of employment as business representaitve of defendant Local Union No. 75 was indefinite and at the pleasure of its trustee while Local Union No. 75 was under trusteeship. His removal from such position by the trustee during the period of trusteeship for failing to carry out and opposing the policies of said trustee was not violative of the provisions of any federal laws.

FIFTH DEFENSE

The claim asserted in plaintiff's Second Cause of Action is preempted under the provisions of the National Labor Relations Act and within the exclusive primary jurisdiction of the National Labor Relations Board.

WHEREFORE, defendant Sheet Metal Workers' International Association, AFL-CIO prays that the complaint be dismissed, it recover its costs of suit incurred, and for such other and further relief as to the Court seems proper.

DATED: December 5, 1983

DONALD W. FISHER, ESQ.
DONALD W. FISHER, CO., L.P.A.

JULIUS REICH, A Member of
REICH, ADELL & CROST
A Professional Law Corporation

/s/ Julius Reich
Attorneys for Defendant
Sheet Metal Workers'
International Association,
AFL-CIO



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

No. CV 83-7146-AWT(Kx)

EDWARD LYNN,
*Plaintiff,*
v.
SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,
*Defendants.*

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[Filed Mar. 8, 1984]

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**DEFENDANT INTERNATIONAL'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Hearing date: April 2, 1984
Hearing time: 10:00 a.m.
Courtroom: 6

Defendant Sheet Metal Workers' International Association, AFL-CIO, hereby moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in favor of the moving defendant dismissing the First Cause of Action from the complaint on the ground that there is no genuine issue as to any material fact and that the moving defendant is entitled to judgment as a matter of law.

This motion is based upon:

(a) the complaint

(b) the answers of the defendants

(c) the deposition of plaintiff Edward Lynn on file with the court and the exhibits appended thereto

(d) the statement of uncontroverted facts

(e) the brief in support of this motion

/s/ Donald W. Fisher
DONALD W. FISHER, ESQ.
DONALD W. FISHER CO., L.P.A.
720 National Bank Building
Toledo, Ohio 43604

/s/ Julius Reich
JULIUS REICH, ESQ.
a Member of
REICH, ADELL & CROST
A Professional Law Corporation
501 Shatto Place, Suite 100
Los Angeles, California 90020

DATED: February 6, 1984



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

No. CV 83-7146-AWT(Kx)

EDWARD LYNN,
*Plaintiff,*

v.

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,
*Defendants.*

---

**DEFENDANT SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW**

Hearing date: April 2, 1984
Hearing time: 10:00 a.m.
Courtroom: 6

Defendant Sheet Metal Workers' International Association submits the following statement of uncontroverted facts with respect to the First Cause of Action in the Complaint herein:

1. Plaintiff Edward Lynn (Lynn) is a resident of Orange County, California and at all times relevant herein was a member in good standing of defendant Local Union No. 75, Sheet Metal Workers' International Association, AFL-CIO (Local 75).

2. Local 75 is a labor union and collective bargaining representative of sheet metal workers in the Los Angeles area who are employed in the sign, food service, and industrial sheet metal industries.

3. Local 75 is affiliated with an international union, defendant Sheet Metal Workers' International Association, AFL-CIO (International).

4. The terms of the relationship between Local 75 and the International are prescribed in a written instrument known as the Constitution and Ritual of the International (Constitution).

5. The Constitution in effect on July 29, 1982, when Lynn alleges he was denied or deprived of rights accruing to him under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), was the one adopted at the International's Thirty-fifth General Convention in St. Louis, Missouri on July 31 to August 4, 1978.

6. In June of 1981, Lynn was duly nominated and elected to the full-time position of business representative of Local 75. The term of office for the position was three years.

7. Other individuals duly nominated and elected to full-time, three-year positions in Local 75 in June of 1981 were Virgil Fox (Fox), business manager-financial secretary/treasurer and James Johnson (Johnson), business representative.

8. The financial condition of Local 75 on June 12, 1982, was such that all of the local union's officers, its business representatives, and business manager signed and sent a letter to the International's President, Edward J. Carlough (Carlough), recommending that the local union be placed under trusteeship.

9. General President Carlough, the International's highest executive and administrative official, placed Local 75 under trusteeship on June 22, 1982, and appointed Richard Hawkins (Hawkins) as the International's trustee.

10. General President Carlough delegated to Hawkins as his personal representative authority under Article Three (3), Section 2(c) of the International's constitu-



tion "to take such action as he deems necessary to protect the interest and welfare of Local 75, its funds, property and membership and the interest and welfare of the International Association [including] but . . . not limited to, the right to suspend local union officers, the Business Manager, and/or the Business Representatives, to fill vacancies in such positions, or offices by appointment or special election or to leave such positions or offices vacant, to hire or discharge any clerical, professional or legal personnel, or to empound (sic) and/or audit the books, records and property of Local Union 75."

11. Hawkins discussed the problems of Local 75 with a number of people, including Lynn.

12. Hawkins told the officers and representatives of Local 75, including Lynn, that an increase in the monthly membership dues from two to three hours' pay per-month and an increase in the initiation fee was necessary to alleviate the local union's financial crisis.

13. The Local 75 executive board approved Hawkins' recommendation for dues and initiation fee increases and a special membership meeting of Local 75 was called for Saturday, July 24, 1982, at which the proposed increases were to be discussed and voted upon by secret ballot.

14. Prior to the July 24, 1982, special meeting of Local 75, Hawkins asked Lynn to support the increases in dues and initiation fees. (Lynn stated before the members of the Local 75 executive board that he would not support them.) Hawkins subsequently asked Lynn what it would take to get his support for the measures and (Lynn responded that, among other things, he would have to get rid of Fox and Johnson. Hawkins refused to take such action.)

15. At the special meeting of Local 75 on July 24, 1982, Hawkins and a number of members and officials spoke in support of the proposed increases. Lynn and some other members spoke in opposition to it.

16. The proposed increases were defeated in a secret ballot vote of the members attending the special meeting. The vote was 130 against and 121 for the measures. Lynn takes credit in part at least for defeat of the measures.

17. Five days after the special meeting, i.e., on July 29, 1982, Hawkins notified Lynn by letter that he was being removed from office indefinitely because of his opposition to the increases proposed at the July 24, 1982, special membership meeting and other actions detrimental to the interests of the union and its membership.

18. Lynn exercised his rights of appeal from his indefinite removal from office. His appeal was denied by the International's General Executive Council on August 27, 1982, and by it General Convention on September 2, 1982.

19. Appeal to the International's General Convention is the final step in the internal union grievance procedure.

## CONCLUSIONS OF LAW

1. The court has jurisdiction over the claim in the First Cause of Action pursuant to 28 USC § 1337 and 29 USC § 412.

2. When a trusteeship is imposed, the General President of the International has constitutional authority to suspend from office any or all local union officers and business representatives or the business manager irrespective of whether such offices or positions were elective or appointive, provided that he deems such action necessary to protect the interest and welfare of the local union and its funds, property, and membership.

3. Hawkins, as trustee of Local 75, and the personal representative of the General President, indefinitely removed Lynn from his elective, full-time position as business representative of Local 75 after Lynn opposed and



spoke against an important measure that Hawkins believed was essential to the local union's welfare and wanted Lynn to support: an increase in the local union's monthly membership dues and its initiation fees.

4. The validity of Hawkins' action was upheld by the International's highest appellate tribunal, its General Convention, on the ground that it was constitutionally permissible conduct. The decision of the General Convention based upon a fair and reasonable interpretation of the International Constitution should be accorded deference by the court. *English v. Cunningham*, 282 F2d 848, 850 (D.C. Cir. 1960); *Vestal v. Toffa*, 451 F2d 706 (6th Cir. 1971); *Stelling v. IBEW*, 587 F2d 1379, 1389 (9th Cir. 1978). Hence, the court concludes that Hawkins' indefinite removal of Lynn from his position as business representative was action Hawkins was authorized to take in his capacity as International trustee. The question remaining is whether such action was violative of any of Lynn's rights under §§ 411(a)(2) or (5) or 529 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq.

5. Lynn's indefinite removal from employment as a business representative, for opposing Hawkins' policy favoring dues and initiation fee increases, occurred while the local union was under an International trusteeship, and at a time that Lynn was serving in this position at the pleasure of the trustee. His removal under these circumstances was not "discipline" within the meaning of § 411 (a)(5) of the Act because such action had no effect on his membership rights, which are what the Act was intended to protect. *Finnegan v. Leu*, 456 U.S. 431 (1982). Accordingly, he was not denied any statutory membership rights under § 411(a)(5) which requires as conditions precedent to the imposition of "discipline" service of specific written charges, a reasonable time to prepare a defense, and a full and fair hearing before being indefinitely removed from such office.

6. Lynn's indefinite removal from office for opposing and speaking out against Hawkins' policy favoring dues and initiation fee increases was likewise not "discipline" within the meaning of § 529 of the Act for exercising rights of freedom of speech guaranteed to union members in § 411(a)(2). His § 411(a)(2) right as a member to speak out on issues involving union affairs was not diminished or impaired by his dismissal from employment as a full-time agent of the local union. A union member's statutory right to oppose union policies affords him no protection against dismissal from employment as an agent of the union because of such opposition. *Finnegan v. Leu*, supra.

7. The First Cause of Action of the Complaint is without merit as a matter of law.

DATED:

United States District Judge



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-7146-AWT (Kx)

EDWARD LYNN,
*Plaintiff,*

vs.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL UNION NO. 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Defendants.*

[Filed Mar. 19, 1984]

**CROSS MOTION AND NOTICE OF CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

April 2, 1984; 10:00 a.m.

TO: SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and to their attorneys:

PLEASE TAKE NOTICE that on April 2, 1984, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable A. Wallace Tashima, United States District Judge, located at 312 North Spring Street, Los Angeles, California, plaintiff, EDWARD LYNN, will, and hereby does, move the Court for partial summary judgment against the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

This cross-motion shall be made on the ground that there is no material issue of fact as provided by Rule 56 of the Federal Rules of Civil Procedure, this notice, and

the Brief in Support Thereof filed concurrently with this motion as well as the records and pleadings on file herein.

Dated: March 13, 1984.

/s/ Bruce M. Stark
BRUCE M. STARK
Attorney for Plaintiff



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

No. CV 83-7146-AWT (Kx)

EDWARD LYNN,
*Plaintiff,*

vs.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL UNION NO. 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Defendants.*

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**PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW**

April 2, 1984; 10:00 a.m.

Plaintiff EDWARD LYNN submits the following statement of uncontroverted facts and conclusions of law as required by Local Rule 7.14.1.

UNCONTROVERTED FACTS

1. Plaintiff Edward Lynn (Lynn) is a resident of Orange County, California, and throughout 1982 was a member of defendant Local Union No. 75, Sheet Metal Workers' International Association, AFL-CIO (Local 75).

2. Local 75 is a labor union and collective bargaining representative of sheet metal workers in the Los Angeles area who are employed in the sign, food service, and industrial sheet metal industries.

3. Local 75 is affiliated with an international union, defendant Sheet Metal Workers' International Association, AFL-CIO (International).

4. In June of 1981, Lynn was duly nominated and elected to the full-time position of business representative of Local 75. His term of office was three years.

5. In June of 1982, the financial condition of Local 75 was such that all of the local union's officers, its business representatives, and business manager signed and sent a letter to the International's President, Edward J. Carlough (Carlough), recommending that the local union be placed under trusteeship.

6. In June of 1982, Carlough placed Local 75 under trusteeship and appointed Richard Hawkins (Hawkins) as the International trustee.

7. Hawkins met with the offices of Local 75 to discuss the financial problems of the local. Hawkins proposed a dues increase and an increase in the initiation fee. Lynn proposed a reduction in Local 75's expenses as a viable alternative.

8. At a special meeting of the membership of Local 75 on July 24, 1982, Hawkins and other officers of Local 75 spoke in support of the proposed increases. Lynn and some others spoke in opposition to the proposed increases.

9. The membership of Local 75 defeated the proposed increases by secret ballot. The vote was 130 against and 121 in favor.

10. Five days later, on July 29, 1982, Hawkins notified Lynn by letter that he was being removed from his duly elected office because of his opposition to the increases proposed at the July 24, 1982, special membership meeting.

11. Lynn exercised his rights of appeal from his removal from office. His appeal was denied by the International's General Executive Council in August of 1982, and by its General Convention in September of 1982.



12. Appeal to the International's General Convention is the final step in the internal union grievance procedure.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction over the claim in the First Cause of Action pursuant to 28 U.S.C. § 1337 and 29 U.S.C. § 412.

2. As an incident of membership, Lynn had a right under 29 U.S.C. § 481(e) "to be a candidate and to *hold* office." Likewise, the members of Local 75 as an incident of their membership, had a right under 29 U.S.C. § 481 to be represented by members of their own choosing by properly conducted elections. *Wirtz v. Hotel Employees, Local 6*, 391 U.S. 492 (1968).

3. Under 29 U.S.C. § 529, it is unlawful for *any* officer of a labor organization to expel or otherwise discipline any of its members for exercising a right to which he is entitled under the provisions of the Act. Lynn had a right under 29 U.S.C. § 481(e) to hold office. The members of Local 75 had a right under 29 U.S.C. §481 to the free election of representatives of their choice. Defendant International abrogated those rights guaranteed under the Act by summarily removing Lynn from his duly elected office and denying the membership of the representative of their choosing. Quite obviously, the membership continued to support Lynn as evidenced by the vote at the special election; 130 to 121 in favor of Lynn's position.

4. 29 U.S.C. §§ 461 et seq. of the Act provides for Trusteeship under certain conditions as set forth in 29 U.S.C. § 462. Among other reasons allowed, is the purpose of restoring democratic procedures. In the instant matter, the trustee, Hawkins, abrogated democratic procedures, as discussed above, in favor of blind adherence to the International's position as to what was best for the membership. This is not "restoring democratic procedures" but imposition of dictatorial powers where the free flow of ideas is stifled. This is anathema to the Act.

5. Plaintiff, Edward Lynn, is entitled to summary judgment against the International on his First Cause of Action as a matter of law.

Dated: April —, 1984.

United States District Judge



**CONSTITUTION AND RITUAL**

Sheet Metal Workers' International Association
and Affiliated Local Unions,
State, District and Provincial Councils

*Revised and amended by authority of the*

36th General Convention

NEW YORK, NEW YOFK
AUGUST 30-SEPTEMBER 3, 1982

*Progress Through Innovation*
*Pride Through Craftsmanship*
*Strength Through Unity*

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ARTICLE THREE (3)

General President

SEC. 2(c). Trusteeship of local unions and councils. Whenever a local union or council or the officers or members thereof fail to comply with the provisions of this Constitution or with the policies of this Association; conduct the affairs of such local union or council in a manner which is detrimental to the best interests of such local union, its members or this Association; act in a manner which brings such local union or council into disrepute with the public or with employers; or disregard the instructions, decisions or orders issued by any officer or tribunal of this Association, the General President shall have authority to place such local union or council under Trusteeship provided that a Trusteeship that is to be continued for a period of more than sixty (60) days shall be subject to ratification by the General Executive Council or a sub-committee thereof after a hearing. During Trusteeship such local union or council shall take no official action without the approval of the General President or a representative designated by him to supervise and direct the Trusteeship. Such Trusteeship shall continue until (a) the causes thereof have ceased, (b) the

charter of such local union has been revoked, withdrawn or transferred under procedures prescribed in this Constitution, or (c) restoration of autonomy is directed as the result of a decision made upon appeal under this Constitution.

During Trusteeship of any local union or council, the General President shall have authority to take such action as he deems necessary to protect the interest and welfare of such local union, council and this Association, and the funds, property and membership thereof, including, but not limited to, the authority to suspend local union or council officers, business managers, or business representatives, fill vacancies in such offices with any representatives of this Association or members of such local union, or call elections for that purpose, and impound the books, records, funds and property of any such local union or council.

During Trusteeship no votes of delegates from such local union or council shall be counted in a convention of this Association unless such delegates have been chosen by secret ballot in a local union or council election in which all members in good standing are eligible to participate.

* * * *

## ARTICLE TWELVE (12)

### Local Union Officers, Business Managers, and Business Representatives

### SECTION 1—NUMBER OF OFFICERS AND TITLES

SEC. 1. The officers of each local union shall be a president, vice president, recording secretary, financial secretary-treasurer, conductor, warden, the members of the local union executive board and at least three (3) trustees. Except as provided in Section 3 of this Article, any offices and positions, the duties of which are not inconsistent, may be combined, or offices and positions previously combined may be separated by action of the



local union at a special called meeting or as a special order of business at a regular meeting held not less than sixty (60) days prior to the next regular election.

* * * *

### SECTION 2—NUMBER OF BUSINESS MANAGERS AND BUSINESS REPRESENTATIVES

SEC. 2. Each local union shall have one (1) business manager and may have additional business representatives all of whom shall be elected by the local unions at the same time and in the same manner and for the same term as local union officers, provided that if, during the regular term of office of local union officers, a local union shall approve the election of additional business representatives they shall be elected during such term to serve until the next regular election of officers, business manager and business representatives.

### SECTION 3—QUALIFICATIONS

SEC. 3. Under no circumstances shall the offices of president and financial secretary-treasurer be combined, nor shall the president, vice president, financial secretary-treasurer or recording secretary be eligible or permitted to act or serve as trustee of the local union, nor may the business manager or business representatives or trustees be eligible or permitted to act or serve as members of the executive board except where the offices of the business manager or business representative has been combined with those of president, vice president or recording secretary, in accordance with this section.

No member shall be nominated for or elected to two local union offices or positions at the same time unless prior to said nomination such offices had been combined by action of the local union.

No member shall be eligible to nomination, election, or appointment, nor shall he be permitted to serve as an

officer, business manager, business representative, delegate, trustee or other representative of any affiliated local union unless (a) he is paying the full dues levied by such local union, (b) such dues and other obligations due the local union and this Association are paid in advance for the current month and are properly recorded on official receipts in his possession, and (c) he has established a record of continuous good standing in the local union in which he is a candidate for a period of not less than three (3) consecutive years immediately preceding his nomination, appointment or election, except in cases where such a requirement would affect a significant number of members or where a new local union has not been in existence for such period, in which cases a shorter period for eligibility may be prescribed with the prior approval of the General President; nor shall he be eligible to nomination, election or appointment or permitted to serve if he is retired on pension under the provisions of the Social Security Act or Railroad Retirement Act or on a pension from this Association or any local union or council thereof or from any pension plan negotiated with employers. A new Local Union as used in this paragraph shall not include a local union resulting from a merger, amalgamation or separation of other local unions which have been in existence for three (3) years or more.

The foregoing qualifications shall be required of members of local unions which have resulted from amalgamation, merger or separation of local unions except that if good standing has been continuous or unbroken then good standing membership in all local unions involved in the amalgamation, merger or separation shall be counted; however, the local union good standing of members who transfer from one local union to another after the amalgamation, merger or separation has been completed or following transfer time limits prescribed in connection with the amalgamation, merger or separation shall commence with the date of transfer.



## SECTION 4—NOMINATION

SEC. 4. Unless otherwise authorized by the General President all nominations for local union officers, business manager and business representatives shall be made at a regular or special meeting held early in the month of June and all nominations shall be closed at said regular or special meeting. The president or presiding officer shall appoint a judge and at least two (2) tellers to conduct an election with respect to such officers. Such election shall be conducted only by such duly appointed judge and tellers. No member may be nominated for or elected to more than one office or position in any local union.

Any member who is nominated for local union office and who is not present at the meeting at which nominations are made shall be dropped from the list of nominees unless within five (5) days after such nomination he notifies the Recording Secretary in writing of his willingness to run for such office.

## SECTION 5—NOTICE

SEC. 5. Only good standing members are eligible to participate and vote and all good standing members of affiliated local unions shall be notified in advance, by written notice, or by notice printed in a publication customarily mailed to all members regarding the date, time, place and purpose of meeting for nomination and also regarding the dates, times and places of elections. Notice of elections shall be mailed to the last known home address of each member not less than fifteen (15) days prior to such election.

## SECTION 6—ELECTIONS

SEC. 6(a). Elections may be held under such rules as are not inconsistent with this Constitution and at such times and places following the nominations as the local union may decide, provided (a) that the selection of the

times and places shall afford the membership a reasonable opportunity to vote, including the notice provided for in Section 5 of this Article, (b) that the election shall be held in the month of June, (c) that officers, business manager and business representatives shall be elected from duly nominated candidates and not by "write-in ballots," and (d) that absentee ballots shall not be used or accepted.

Elections shall be conducted by secret ballot except in those instances where there is only one (1) nominee for the office. The nominee receiving the highest number of votes for each office shall be declared elected.

SEC. 6(b). A "secret ballot" vote shall mean the expression by ballot, voting machine or otherwise, of a choice by the member cast in such manner that such member cannot be identified with his vote. All election records, including ballots, shall be preserved for one (1) year by an officer designated by the local union or by the Recording Secretary if no other officer is designated.

SEC. 6(c). Tellers & Judge. The tellers and judge shall make arrangements for and conduct the election at the times and places specified by the local union in accordance with this Constitution; examine and count all legal

## SECTION 7—TERM OF OFFICE

SEC. 7. Local Union officers, business manager and business representatives shall be installed at the first regular meeting in the month of July following their election. All local union officers, business manager and business representatives shall be elected to serve a term of three (3) years.

## SECTION 8—VACANCIES

SEC. 8(a). When a permanent vacancy occurs in any office or position the local union shall promptly fill the same for the unexpired term by nomination at a regular



or special meeting and by election held in the same manner and under the same rules as those governing regular elections, provided that if a vacancy occurs within a twelve (12) month period prior to the next regular election such office may be filled by appointment by the local union Executive Board.

No incumbent of an office or position in a local union shall be eligible for nomination, election or appointment to fill a permanent vacancy in accordance with the provisions of this Section (a) unless prior thereto he resigns from the office or position of which he is the incumbent.

SEC. 8(b). When a temporary vacancy occurs, the local union shall fill such office or position pro tem by election or appointment by the local union executive board as the local union may decide. The term of such pro tem officer shall continue until the resumption of office by the officer who vacated it or until the next regular election, whichever occurs first.

In the event a pro tem officer is elected or appointed while he is an incumbent of another local union office or position, he shall be entitled to resume his former office or position if he is displaced from the pro tem office by the return of the regular incumbent prior to the next regular election.

SEC. 8(c). In the event an election is to be held, the vacant office or position may be filled by appointment by the local union executive board pending the holding of

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## ARTICLE THIRTEEN (13)

Duties of Local Union Officers, Business Manager, and Business Representatives

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### SECTION 8—DUTIES OF BUSINESS MANAGER AND BUSINESS REPRESENTATIVES

SEC. 8(a). Business managers or business representatives or both shall represent their local unions and the members thereof in matters pertaining to collective bargaining agreements, wages, hours, conditions of employment and jurisdictional matters and supervise the conduct and activities of members in connection therewith to the end that the provisions of this Constitution and the policies of this Association are complied with; assist and cooperate with the officers of local unions and the members thereof in carrying out the provisions of this Constitution; use their best efforts to adjust and settle such controversies as may arise in connection with complaints of members, consistent with the rights of those involved, in accordance with the provisions of this Constitution and the policies of this Association.

In all matters involving jurisdiction of work, business managers and business representatives shall recognize, protect and be governed by the jurisdictional claims and rights of the Association as set forth in Article One (1), Section 5 of this Constitution and shall not waive or relinquish claim to any work specified therein.

SEC. 8(b). The business manager will direct the business representative or business representatives and serve as chairman of the committee which negotiates wages, hours, and conditions of employment. He shall appoint all Committees for which provisions are made in collective bargaining agreements excluding trustees of jointly administered trust funds.



## ARTICLE NINETEEN (19)
Appeals

### SECTION 1—WHO MAY APPEAL

SEC. 1. Any local union, council, officer, representative of this Association or any officer, representative, or member of any local union or council thereof whose constitutional rights are violated by any decision or order of a local union or council or a legally constituted tribunal thereof or by any decision or order of any general officer or officers, representative, or the General Executive Council of this Association shall have the right to appeal as provided in this Article.

### SECTION 2—APPEALS TO THE GENERAL PRESIDENT

SEC. 2(a). Except as otherwise provided in this Constitution all original appeals shall be referred to the General President for consideration and decision unless the parties, with the consent of the General President, agree that an appeal be made directly to the General Executive Council.

SEC. 2(b). All appeals to the General President shall be in written form, filed with the General Secretary-Treasurer and a copy mailed to the opposing party or parties within thirty (30) days from the date of the action from which appeal is taken, unless notice thereof is required by this Constitution, in which event, the appeal must be filed and served within thirty (30) days of the date of such notice. If the appeal is from a decision of a Trial Board or a Trial Committee, the notice referred to herein shall date from the mailing to the parties of a copy of the transcript of the minutes of the Trial or action of the Local Union on the decision, whichever is the later. The appeal shall be filed by the party or parties seeking the same, signed by him or them and shall be accompanied by all written evidence in affidavit form and

such exhibits and arguments as are deemed necessary by the appealing party or parties for the proper and complete consideration of his or their appeal. Appeals from any decision or order directed to a local union or council shall be made by the involved local union or council and not by an individual member or members thereof and shall require authorization by the local union or council and be signed by the president therof. Parties other than the appellant shall have the right to file an answer to such appeal with the General President within thirty (30) days after the receipt thereof, which answer shall contain such written rebuttal evidence, exhibits and arguments as they deem necessary for the proper and complete consideration of the appeal. Should the party other than the appellant fail to file an answer to an appeal within the above time limit the General President shall consider the record to be closed and shall render his decision on the record thus made, and mail a copy to the parties to the appeal. His decision shall be final and binding, unless changed on further appeal, as provided in this Article.

Should the appeal be predicated upon any action of a local union or council, copies thereof shall be furnished to such local union or council which shall be entitled to file reply thereto in the same manner as an appellee.

## SECTION 3—APPEALS TO THE GENERAL EXECUTIVE COUNCIL

SEC. 3(a). All appeals from decisions or orders of the General President and all original appeals properly presented to the General Executive Council shall be filed in writing with the General Secretary-Treasurer and a copy mailed to opposing parties within sixty (60) days from the date of the decision or action from which appeal is taken, unless notice thereof is required by this constitution, in which event, the appeal must be filed and served within sixty (60) days from the date of such notice. The appeal shall be signed by the party or parties seeking appeal and shall be accompanied by all additional evidence in affidavit form and such exhibits and argument as are deemed necessary by the appealing party or parties for the proper and complete consideration of his or their appeal. Parties other than the appellant shall have the right to file an answer to such appeal with the General Secretary-Treasurer within sixty (60) days after receipt thereof, which answer shall contain such written rebuttal evidence in affidavit form, exhibits and argument as they deem necessary for the proper and complete consideration of the appeal.



SEC. 3(b). The General Executive Council shall base its decision only upon the evidence and argument submitted in accordance with Section 2(b) and Section 3(a) of this Article, unless one of the parties requests the right to appear personally before the General Executive Council during the consideration thereof. Should such request be made, the General Secretary-Treasurer shall notify all other parties to the proceedings of their right to appear before the General Executive Council in connection with the appeal. Parties who appear before the General Executive Council in connection with any appeal shall be permitted only to present argument on the written record made and shall not be permitted to introduce additional evidence.

SEC. 3(c). The decision of the General Executive Council shall be by majority vote of those participating and shall be final unless changed upon appeal to the General Convention, and the General Secretary-Treasurer shall furnish each party to the appeal, in writing, by registered or certified mail, a copy of the decision of the General Executive Council.

## SECTION 4—APPEALS TO THE GENERAL CONVENTION

SEC. 4. Unless otherwise provided in this Constitution, all appeals from decisions of the General Executive Council shall be referred to the Grievances and Appeals Committee of a General Convention which shall render its decision upon the written record made before the General Executive Council. Any party to an appeal to the Grievances and Appeals Committee shall be permitted to appear before said committee for the purpose of argument, but shall not be permitted to introduce additional evidence. The Grievances and Appeals Committee shall report to the General Convention such recommendations with respect to the disposition of the appeal as it deems fair and proper, which report shall be acted upon by the Convention in the same manner as reports of other Convention committees, except that debate in connection therewith shall not be permitted. The Convention delegates shall vote, without debate, solely on the question of whether to accept or reject the decision and recommendations of the Grievance and Appeals Committee, and a majority vote of the delegates to the Convention shall be final.

All such appeals shall be filed with the General Secretary-Treasurer within sixty (60) days from notice of decision by the General Executive Council. The General Secretary-Treasurer shall mail notice of such appeal to the other parties involved.

## SECTION 5—COMPLIANCE PENDING APPEAL

SEC. 5(a). Except as provided in Section 3 of Article Seventeen (17) and Section 5(b) of this Article, no appeal shall be recognized or considered unless the local union, council, officer, representative, or member thereof filing the appeal has accepted and complied with the decision or order from which such appeal is taken, including the payment of all financial obligations in connection therewith.



SEC. 5(b). In the event the General President or the General Executive Council concludes that compliance with Section 5(a) of this Article or with Section 3 of Article Seventeen (17) would constitute a substantial bar to the exercise of the right of appeal, compliance therewith may be waived or modified by the General President with respect to appeals submitted to him and by the General Executive Council with respect to appeals submitted to it or to the General Convention, provided, however, that in the event the decision or order appealed from directs suspension or expulsion from membership compliance with such portion thereof pursuant to section 5(a) of this Section shall be waived automatically pending disposition of any appeal to the General President or the General Executive Council but not thereafter unless expressly waived by the General Executive Council.

## SECTION 6—DEFERRED APPEALS

SEC. 6. The General President, General Executive Council and General Convention are hereby authorized to refuse or defer consideration, or to refuse, defer or withhold decisions in any matter pending in any court of law as circumstances in their opinion and judgment may warrant and justify.

## SECTION 7

SEC. 7. Appeals not filed within the time limits prescribed in this Article shall be dismissed by the General Secretary-Treasurer and notice of such dismissal sent to the appellant by certified mail. Unless the appellant submits facts which if established by proof would show the appeal to be timely the decision of the General Secretary-Treasurer shall be final and not subject to appeal.

## SECTION 8

SEC. 8. The General President, General Executive Council and General Convention shall have the right to affirm, amend, modify, or reverse any decision which has been submitted to him or to them on appeal, and fix the penalty, if any, in connection therewith.

## SECTION 9—APPEALS TO COURTS

SEC. 9. Subject to applicable law, no local union, council, or officer or member thereof shall appeal to the Civil Courts for redress until all of the internal remedies provided in this Constitution, including the right of appeal, have been exhausted.

# PETITIONER'S

# BRIEF

(6)



No. 86-1940

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
*Petitioners,*

v.

EDWARD LYNN,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Whether the Labor-Management Reporting and Disclosure Act of 1959, as interpreted in *Finnegan v. Leu*, 456 U.S. 431 (1982), prohibits an international union trustee from suspending during the term of a lawful trusteeship, an elected local union official who has used his elected position to oppose the policies of the trustee?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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No. 86-1940

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR PETITIONERS

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 804 F.2d 1472, and is reprinted at pp. 1a to 27a of the Appendix to the Petition for Certiorari ("Pet. App."). The opinion and order of the United States District Court for the Central District of California are unreported and are reprinted at Pet. App. 29a to 36a.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1986. Petitioners' motion for rehearing and suggestion for rehearing *en banc* were denied by the

court of appeals on February 4, 1987. On April 17, 1987 Justice O'Connor entered an order granting petitioners an extension of time to and including June 4, 1987 for filing a petition for a writ of certiorari. The petition was filed on that date and was granted on March 21, 1988. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutory provisions involved in this case are reprinted as an appendix to this brief.

## STATEMENT OF THE CASE

Petitioner Local 75 of the Sheet Metal Workers' International Association ("the Local") is a labor union which serves as the collective bargaining representative for sheet metal workers in the Los Angeles area. At all time relevant herein, the Local was an affiliate of petitioner Sheet Metal Workers' International Association ("the International"). Pet. App. 32a.

In June 1981, respondent Edward Lynn, a member of the Local was elected to a three-year term as one of the two business representatives of the Local. Under the International Constitution, a local business representative works under the direction of the elected business manager, the chief executive officer of the local, and performs a variety of functions pertaining to organizing unorganized workers and bargaining for and administering the contracts covering organized workers. Pet. App. 32a, J.A. 50.

In June 1982, the elected officials of Local 75, including Lynn, wrote to the International President, Edward Carlough, requesting him to exercise his power under the International Constitution to place the Local under a trusteeship. The officials made the request because the financial condition of Local 75 was critically depressed



and divisions among the elected officials made it impossible for them to place the Local on a sound financial footing. Pet. App. 33a, 2a.

On June 22, 1982, General President Carlough granted the local officials' request and placed the Local in trusteeship; Carlough explained that he was persuaded that "factional strife" within the Local was "primarily responsible for the precarious . . . financial condition of the local" and that this "internal strife is making it impossible for the . . . local union . . . to comply with the obligations imposed upon the local as a collective bargaining representative." J.A. 17. President Carlough appointed Regional Director Richard Hawkins to serve as trustee "with full authority to supervise and direct the affairs of Local Union 75." *Id.* Hawkins, the personal representative of the General President, was vested with authority under Article Three, § 2(c) of the International's Constitution to:

> . . . take such action as he deems necessary to protect the interest and welfare of such local union, . . . and the funds, property and membership thereof, including, but not limited to, the authority to suspend local union . . . officers, business managers, or business representatives; fill vacancies in such offices . . . or call elections for that purpose, or leave some or all of the offices vacant; combine one or more offices and positions; and impound the books, records, funds and property of any such local union . . . [Pet. App. 33a, J.A. 16, 44].

The local officers were placed under a correlative duty to "take no official action without the approval of the [trustee]." [J.A. 16, 43].

After reviewing the financial condition of the Local—and mindful of the fact that the International's constitution requires each local to "maintain a . . . rate of dues sufficient to carry on the affairs of such local union on a sound financial basis," J.A. 20—Hawkins concluded

that it "was essential to the local union's welfare," Pet. App. 35a, to augment the Local's income by increasing its monthly dues and initiation fees. Hawkins prepared a proposal to that effect which he submitted to and which was approved by the Local's Executive Board. A special membership meeting was scheduled for July 24, 1982 to vote on the proposal; Hawkins advised all officials of the Local, including Lynn, that he (Hawkins) expected the officers to support the recommendation. Pet. App. 33a-34a.

Prior to the special meeting, Hawkins specifically asked Lynn to support the proposed dues increase but Lynn refused. Hawkins subsequently asked Lynn what it would take to get Lynn's support; Lynn stated that Hawkins would have to get rid of Virgil Fox, the Local business manager, and James Johnson, the Local's other business representative. Hawkins refused to accede to these demands. Pet. App. 34a.

At the special membership meeting on July 24, 1982, Lynn not only failed to support the measures proposed by Hawkins but, along with some rank-and-file members, took the floor to speak in opposition to them. The dues increase was defeated by a narrow vote 130 to 121 for which Lynn openly took at least partial credit. Pet. App. 34a.

Five days after the special meeting, Hawkins, exercising his authority as trustee, indefinitely suspended Lynn from his position as business representative. Hawkins notified Lynn that his suspension was "necessary due to various actions you have taken which are detrimental to the International Association and Local 75 and your refusal to support the officers of Local 75 in their efforts to comply with [the International Constitution]." J.A. 20. Lynn's removal from office "had no effect on his membership rights in the Local," Pet. App. 36a, which remained unimpaired.

After exhausting his internal union remedies, Lynn commenced this action against the International and



Local under § 102 of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 412. Count one of Lynn's complaint alleged that Hawkins' actions in suspending Lynn violated LMRDA § 101 (a)(2), the free speech provision of the LMRDA, 29 U.S.C. § 411(a)(2).[1]

On cross-motions for summary judgment the district court ruled for the Local and International (collectively referred to hereinafter as "the Union"), reasoning that under this Court's decision in *Finnegan v. Leu*, 456 U.S. 431 (1982), "'[a] union members' statutory right to oppose union policies affords him no protection against dismissal from employment as an agent of the union because of such opposition." Pet. App. 36a.

Lynn appealed to the United States Court of Appeals for the Ninth Circuit which, by 2-1 vote, reversed the district court's judgment. The panel majority rejected the Union's contention that "*Finnegan* should control," Pet. App. 8a, as the majority was persuaded that the removal of an elected union official—unlike the removal of appointed officials—"can only impede the democratic governance of the union," Pet. App. 11a. The panel majority also rejected the Union's contention that "even if [*Finnegan*] does not [control], Hawkins, acting as trustee, had the authority . . . to remove Lynn from his post," Pet. App. 8a; the majority concluded that "while

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[1] Count one of Lynn's complaint also alleged that the suspension of Lynn as business representative constituted "discipline" as to which the procedural requirements of LMRDA § 101(a)(5), 29 U.S.C. § 411(a)(5), applied. J.A. 8-9. The lower courts dismissed that claim on the merits, and Lynn has not sought review of the dismissal.

The second count of Lynn's complaint alleged that the local had violated the provisions of the collective bargaining agreements to which the Local was a party by discriminating against Lynn in the operation of the local hiring hall following the events recited in text. J.A. 10-11. That count was dismissed below on procedural grounds, Pet. App. 14a-23a, and also is not before this Court at this time.

a trustee may remove an elected local officer for financial misconduct, it may not do so in retaliation for the exercise of a right protected by the LMRDA," Pet. App. 13a (citations omitted).

Then-Judge Kennedy dissented. He reasoned that "the mere fact that Lynn was an elected officer is not sufficient" to distinguish *Finnegan* from the instant case, and that "[a]t least absent allegations that [Lynn's] suspension was part of a scheme to subvert the union's basic democratic structure . . . the injury suffered by Lynn is primarily connected with his status as an officer, not a union member, and does not support a claim under the LMRDA." Pet. App. 26a-27a.

## SUMMARY OF ARGUMENT

Title III of the LMRDA expressly permits international unions to place local unions in trusteeship under certain defined circumstances. Such a trusteeship, by definition, "suspends the autonomy" of the local and places the local under the "supervision or control" of the international. The question presented here is whether a local union official who was elected when the local was autonomous—and whose authority is suspended during the term of a trusteeship—nonetheless is entitled, by virtue of the free-speech provision in Title I of the LMRDA, to hold on to his or her elected position even though the official chooses to use that position to oppose the policies adopted by the international trustee.

Although this Court has never directly addressed that question, *Finnegan v. Leu*, *supra*, does consider an analogous question concerning the authority of a union president to remove appointed union officials. *Finnegan* teaches that "it was rank-and-file union members—not union officers or employees as such—whom Congress ought to protect" in enacting Title I, and that therefore the suspension or removal of a union officer or employee is actionable under Title I only in the eventuality that the



action infringes the "*membership rights*" protected by the LMRDA. *Finnegan* further teaches that the determination of what suspensions or removals of officers and employees constitute such an infringement is to be made by evaluating the specific type of union action involved in the particular case. It facilitates analysis here, therefore, to focus on the nature of the union action challenged in this case—an international trustee's decision to suspend an elected official of the local in trusteeship—rather than to attempt to formulate a comprehensive and nuanced general rule sufficient to take account of all types of suspensions or dismissals of elected officers. Pp. 9-14, *infra*.

Section 101(a)(2) grants each "member of a labor organization" the right to "express . . . views" at union meetings, subject to the union's power to enforce "reasonable rules" which may limit that right. Neither the statutory language nor the legislative history of this section provides any further guidance in answering the question posed here. But in enacting Title III of the LMRDA Congress thoroughly examined union trusteeships and decided to regulate the purposes for which a trusteeship may be established, but *not* to ban trusteeship and *not* to restrict an international's plenary powers over a local in trusteeship. Congress made this judgment with a complete understanding that when a local is placed in trusteeship, the international trustee acquires total authority over the affairs of the local, including all of the authority of the local's elected and appointed officials. To the extent a local official retains a local union position during a trusteeship, the official serves at the pleasure of the trustee and derives his authority to act from the trustee.

It would thus be completely contrary to the policies underlying Title III to hold that, in enacting LMRDA § 101(a)(2) Congress intended—without ever so stating—to immunize local union officials from suspension

from office at the behest of an international trustee if the officials use their positions to lead a campaign of opposition to the trustee. Rather, during a trusteeship local officials, whether originally elected or appointed, occupy a status precisely analogous to the staff employees in *Finnegan*, and just as Title I "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own," *Finnegan*, 456 U.S. at 442, so, too, Title I, does not restrict the freedom of an international trustee to choose subordinate officials with compatible views. Pp. 14-24 *infra*.

In holding that the suspension of Lynn was unlawful, the court below proceeded on the premise that Lynn was suspended "'as part of a purposeful and deliberate attempt . . . to suppress dissent within the union.'" But because this case turns on the suspension of a single official, the holding below necessarily reduces to the proposition that the act of suspending or removing any elected official *ipso facto* constitutes the unlawful suppression of dissent and is *per se* violative of Title I. That proposition is inconsistent with *Finnegan* which holds that even removing every union staff member opposed to the president does not, without more, establish the unlawful suppression of dissent. And by equating an isolated suspension of a single local official by an international trustee with an unlawful suppression of dissent, the decision below flies in the teeth of LMRDA Title III. Pp. 24-26 *infra*.



## ARGUMENT

### TITLE I OF THE LMRDA DOES NOT PROHIBIT AN INTERNATIONAL UNION TRUSTEE WHO IS APPOINTED TO RUN THE AFFAIRS OF A LOCAL UNION AS PERMITTED BY LMRDA TITLE III FROM SUSPENDING DURING THE TERM OF THE TRUSTEESHIP AN ELECTED UNION OFFICIAL WHO OPPOSES THE TRUSTEE'S POLICIES.

The central fact that defines this legal controversy is that Edward Lynn was suspended from his local union position by the International Union Trustee appointed to manage the affairs of the Local while the Local was under the International's supervision. Such trusteeships are, of course, expressly permitted by Title III of the LMRDA, 29 U.S.C. §§ 461-66, under certain defined circumstances, *see* LMRDA § 302, 29 U.S.C. § 462; p. —, *infra*. And the LMRDA provides in terms that when a local union is placed under international union trusteeship, the international—through the trustee—assumes "supervision or control" of the local and is empowered to "suspend[] the autonomy otherwise available to the local." LMRDA § 3(h), 29 U.S.C. § 402(h)( defining "trusteeship").

It is undisputed that the trusteeship in this case was a lawful one, necessitated by the Local's desperate financial straits. The question presented here is whether a local union official who was elected when the local was autonomous—and whose independent *authority* is suspended during the term of a trusteeship—nonetheless is entitled, by virtue of Title I of the LMRDA, to hold on to his or her elected *position* if the official chooses to use that position to oppose the policies adopted by the international union trustee. For the reasons that follow we submit that the question should be answered in the negative.

A. This Court has not yet rendered any decision which addresses LMRDA Title III or its intersection with Title

I. But *Finnegan v. Leu*, *supra*, does consider an analogous question involving the authority of a union president to remove appointed union officials. *Finnegan* thus provides a logical starting point for analysis in this case.

In *Finnegan*, fifteen union members who held staff positions as appointed union business agents and who, in that capacity, served in the union's legislative assembly, were discharged from such employment (and from their derivative positions in the assembly) by the newly-elected president of a local union.[2] The president took this action on assuming office after defeating the former incumbent because during "the vigorously contested campaign," the fifteen business agents had exercised their right, as members of the local, to "openly support[] the incumbent president." 456 U.S. at 433. The business agents challenged their discharges as violative of the LMRDA. This Court unanimously upheld the dismissal of the business agents' complaint.

The Court began its analysis by reviewing the history of, and the policies underlying, the LMRDA:

> The relevant provisions of the Act had a history tracing back more than two decades . . . Tensions between union leaders and the rank-and-file members and allegations of union wrongdoing led to extended congressional inquiry. As originally introduced, the legislation focused on disclosure requirements and the regulation of union trusteeships and elections. However, various amendments were adopted, all aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution; not surprisingly, these amendments—ultimately enacted as Title I of the Act, 29 U.S.C. §§ 411-415—were introduced under the title of "Bill of Rights of Members of Labor Organizations." [456 U.S. at 435.]

[2] *See Navarro v. Leu*, 469 F. Supp. 833 (N.D. Ohio 1979), *aff'd*, 632 F.2d 58, *aff'd sub nom. Finnegan v. Leu*, 456 U.S. 431 (1982).



This history led the Court to conclude that the LMRDA "was the product of congressional concern with widespread abuses of power by union leadership" against union members, *id.*, and that in enacting Title I in particular, "it was rank-and-file union members—*not union officers or employees, as such*—whom Congress sought to protect," *id.* at 437 (emphasis added).

Against this background, the *Finnegan* Court turned to the specific issue presented in that case:

> Petitioners held a dual status as both employees and members of the Union. As *members* of Local 20, petitioners undoubtedly had a protected right to campaign for [the incumbent] and support his candidacy. At issue here is whether they were thereby immunized from discharge at the pleasure of the president from their positions as appointed union *employees*. [*Id.*; emphasis in original.]

The Court proceeded to observe that the plaintiffs in *Finnegan* "were not prevented from exercising [their] rights" as union members "to campaign . . . and to vote . . ." and that the plaintiffs claimed "only an *indirect* interference with their membership rights, maintaining that they were forced to choos[e] between their rights of free expression . . . and their jobs," *id.* (emphasis in original). *Id.* at 440. The question thus posed was whether such "indirect interference" violates the LMRDA.

In answering that question the Court declined to "decide whether the retaliatory discharge of a union member from union office . . . might ever give rise to a cause of action under [LMRDA] § 102." *Id.* at 440-41. Instead the Court ruled that "whatever limits Title I places on a union's authority to utilize dismissal from union office as 'part of a purposeful and deliberate attempt . . . to suppress dissent within the union,' "—a question the Court in *Finnegan* did not decide—Title I "*does not restrict the freedom of an elected union leader to choose a staff*

*whose views are compatible with his own.*" *Id* at 441 (emphasis added).

The Court explained that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness," *id.* at 441, and "[n]othing in the Act evinces a congressional intent to alter the traditional pattern which would permit a union president . . . to appoint agents of his choice to carry out his policies," *id.* at 442. That being so it is "virtually inconceivable that Congress would have prohibited th[is] longstanding practice . . . without any discussion in the legislative history of the Act" and without "ma[king] some express accommodation to the needs of union employers to appoint and remove policymaking officials." *Id.* at 441, n.12.

The Court acknowledged that its holding "[n]o doubt . . . poses a dilemma for some union employees; if they refuse to campaign for the incumbent, they risk his displeasure and by supporting him risk the displeasure of his successor." *Id.* at 442. But

> in enacting Title I of the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choosing his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union *members* from arbitrary action by the union or its officers. [*Id.*; emphasis in original]

B. *Finnegan* is instructive here in two regards.

*First*, and most importantly, *Finnegan* underscores what, in any event is, in the Court's own words, "readily apparent both from the language . . . and from the legislative history of Title I": in enacting that Title, "it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect." 456 U.S. at 436-37. It follows, as *Finnegan* makes



clear, that a union member's *status* as a "union officer[] or employee[]" is *not* in and of itself protected by Title I, and that the suspension or removal of a "union officer or employee" does *not*, standing alone, give rise to any claim under Title I. Rather, such a suspension or dismissal is actionable under Title I only in the eventuality that removing an individual from his union office "infringe[s]" the "*membership rights*" protected by the LMRDA. 456 U.S. at 440 (emphasis added).

*Second*, *Finnegan* indicates that the determination of what suspensions or removals of union officers or employees constitute an unlawful infringement of membership rights is to be made by evaluating the specific type of union action involved in a particular case. While the Court in *Finnegan* was urged to resolve that case through a broad categorical rule, the Court confined itself to ruling on the legality of "an elected union president['s] . . . select[ion of] his own administrators," *id.* at 441; the Court "le[ft] open the question whether a different result might obtain in a case involving nonpolicymaking and nonconfidential employees," *id.* at 441, n.11, or a case involving "'a purposeful and deliberate attempt . . . to suppress dissent,'" *id.* at 441.

Following *Finnegan*'s lead, it facilitates analysis here to focus on the specific type of union action involved in *this* case—*viz.*, an international union trustee's decision to suspend an elected official of the local in trusteeship—and to determine whether such a suspension, when predicated on the local official's actions in opposing the trustee's policies, impermissibly infringes upon *membership rights*. Put differently, and paraphrasing *Finnegan*, the question here is whether individuals who are elected to local union office prior to the imposition of a trusteeship and who exercise their right as members to oppose the trustee, are thereby "immunized" from removal from their office "at the pleasure" of the international trustee.

*Compare* 456 U.S. at 437. It is to that question that we now turn.[3]

C. (1) LMRDA § 101(a)(2) grants each "*member of a labor organization*," *inter alia*, "the right to . . . express at meetings of the labor organization his views . . . upon any business properly before the meeting." That section is subject to a proviso which permits a union to enforce "reasonable rules" which may limit the rights just stated. "Congress adopted the proviso in order to ensure that the scope of the statute was limited by a general rule of reason." *Steelworkers v. Sadlowski*, 457 U.S. 102, 111-12 n.4 (1982).

The statutory language provides no further guidance as to the parameters of the § 101(a)(2) guarantee or of that "general rule." Nor is the legislative history of Title I of help in answering the question posed here. That Title "did not find [its] way into the Act until the proposed legislation was fully considered on the floor of the Senate." *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 536 (1984). Title I "was quickly accepted without substantive change by the House." *Id.* at 537-38. And the brief floor discussions of Title I, *see* 2 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1102-1119, 1229-39 ("*LMRDA Leg. Hist.*"), did not focus on the issues raised by the removal of an elected or appointed union official.

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[3] We note that, because of the myriad of ways by which, and myriad of grounds for which, an elected official might be removed from office, it would be particularly difficult to formulate a general rule that satisfactorily encompasses all suspensions or dismissals of elected union officials. A recall by referendum vote, for example, is different in kind from an impeachment which is, in turn, different from a suspension by an international union trustee. Any attempt to formulate a uniform rule to govern these quite different situations would necessarily fail to take account of the differences.



(2) Fortunately, however, for purposes of the issue presented in the instant case, the statutory materials do not end with the language and history of Title I. What ultimately is at issue here is the preregoatives of an international union trustee with respect to a local union in trusteeship. And in Title III of the LMRDA, 29 U.S.C. §§ 461-66, Congress, after extensive legislative consideration, enacted what its original sponsor called "very elaborate procedures for the control of trusteeships." 104 Cong. Rec. 11458 (1958) (Sen. Kennedy). The legislative materials surrounding the enactment of that Title thus bear careful inspection.

The legislative history of Title III begins in 1958, when the Select Committee on Improper Activities in the Labor or Management Field—popularly known as the McClellan Committee—issued its "Interim Report," S. Rep. 1417, 85th Cong. 2d Sess. (1958). That report contained a handful of recommendations including that Congress enact a "limitation on the right of internationals to place local unions in trusteeship." *Id.* at 452. Shortly thereafter, Senator Kennedy, the Chairman of the Senate Labor Subcommittee, introduced a labor-reform bill containing provisions respecting trusteeships, *see* S. 3454, 85th Cong. 2d Sess. (1958). After a lengthy legislative process, which we describe in the margin, those provisions were eventually enacted into law as LMRDA Title III.[4]

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[4] The Senate Subcommittee on Labor held sixteen days of hearings on Senator Kennedy's bill and like bills introduced by other Senators, *see* Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Union Financial and Administrative Practices and Procedures, 85th Cong. 2d Sess. (1958) (hereinafter "1958 Hearings"), after which the Labor Committee reported out the Kennedy-Ives bill, S. 3974, 85th Cong. 2d Sess. (1958), which contained in slightly-modified form the original Kennedy trusteeship proposals. The Senate debated the Kennedy-Ives bill for fiive days and then approved it by a vote of 88-1. 104 Cong. Rec. 11486-87.

The House Committee on Education and Labor never acted on the Senate bill in 1958. An attempt to suspend the House rules and

The legislative materials surrounding the enactment of Title III make quite clear the dual concerns underlying that Title.

To begin with, Congress recognized that "labor history and the hearings of the McClellan committee demonstrate that in some instances trusteeships have been used as a means of consolidating the power of corrupt union officers, plundering and dissipating the resources of local unions, and preventing the growth of competing political elements within the organization." S. Rep. 1684, 85th Cong. 2d Sess. 9 (1958); S. Rep. 187, 86th Cong. 1st Sess. 17 (1959), 1 LMRDA Leg. Hist. 413. It was largely for this reason that Congress decided to regulate the entire matter of trusteeships.

At the same time, Congress also concluded that trusteeships are "perhaps the primary device by which international officers can keep the labor movement strong and effective, untainted by corruption and free from sub-

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approve the bill without Committee action failed to obtain the two-thirds majority needed for approval. 104 Cong. Rec. at 18260, 18287-88.

At the start of the next Congress, Senator Kennedy joined by Senator Ervin reintroduced the bill with minor modifications, *see* S. 505, §§ 201-06, 86th Cong., 1st Sess. (1959), 1 LMRDA Leg. Hist. at 55-59. Following further hearings, *see* Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Labor-Management Reform Legislation, 86th Cong. 1st Sess. (1959) (hereinafter "1959 Hearings"), the Senate Labor Committee reported out a modified Kennedy-Ervin bill which contained the Kennedy trusteeship proposals, *see* S. 1555, §§ 201-06, 86th Cong. 1st Sess. (1959), 1 LMRDA Leg. Hist. at 367-72. That bill was approved by the Senate (after five more days of debate) by a vote of 90-1, 2 LMRDA Leg. Hist. at 1257, and the trusteeship provisions of the bill were incorporated verbatim into the Landrum-Griffin bill, H.R. 8400, §§ 301-06, 86th Cong. 1st Sess. (1959), which was adopted on the floor of the House as a substitute for the House Education and Labor Committee's bill, 2 LMRDA Leg. Hist. 1645, 1691-92.



version at the local level." S. Rep. 1684, *supra*, at 9.[5] Indeed the Senate Labor Committee found that "[i]n general, they [trusteeships] have been widely used to prevent corruption, mismanagement of union funds, violation of collective bargaining agreements, [and] infiltration of Communists; in short, to preserve the integrity and stability of the organization itself." S. Rep. 187, *supra*, at 17, 1 LMRDA Leg. Hist. 413. These are, the Committee stated, "necessary and fully legitimate use[s] of trusteeships." S. Rep. 1684, *supra*, at 9; S. Rep. 187, *supra*, at 17, 1 LMRDA Leg. Hist. 413.

For present purposes it is important to note also that the 1958 and 1959 Congresses fully understood that placing a local union in trusteeship amounts to a "suspension of local self-government," S. Rep. 1684, *supra*, at 10; S. Rep. 187, *supra*, at 18, I LMRDA Leg. Hist. 414, and a transfer to the international of the authority to "conduct [the local's] affairs without meetings or elections." S. Rep. 1684, *supra*, at 9. Indeed as previously noted, LMRDA § 3(h) *defines* the term "Trusteeship" to mean "any . . . method of supervision or control whereby a

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[5] In his testimony before the Senate Labor Subcommittee, George Meany, the President of the AFL-CIO, had reviewed with the Subcommittee "situations of . . . various types [in which] an international union may be fully justified in establishing a trusteeship." 1958 Hearings at 65. For example, Meany noted that trusteeships are sometimes needed in order to remove "dishonest persons" from local union office or to remove "officers [who] are extravagant or improvident and involve a local union in financial difficulties." *Id.* at 63. Meany likewise explained that "occasionally a local union officer . . . secures complete control over the local and becomes a virtual dictator" at which point "it may be necessary for an international to establish a trusteeship." *Id.* And Meany observed that "[s]ome years ago, the CIO and some of the international unions then affiliated with it had serious problems in combating Communist control over some of their subordinate bodies, and in this situation, too, the establishment of trusteeships was one of the means by which the subordinate bodies were freed and protected from Communist control." *Id.* at 64.

labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws." And Professor Archibald Cox, who served as the principal advisor to Senator Kennedy and the Senate Labor Subcommittee in crafting the LMRDA, advised the Senate Committee in 1958—and reminded the Committee in 1959—that a "trusteeship destroys democratic self-government" for so long as the trusteeship lasts. 1958 Hearings at 352; 1959 Hearings at 131.[6] Professor Cox elaborated:

> *There are no local officers.* There are no elections. Often there are no union meetings; and when meetings are held, the members may not be allowed to vote. [1958 Hearings at 352-53; 1959 Hearings at 131 (emphasis added).]

Against this background, and recognizing what a trusteeship entails, the Senate Labor Committee sought to devise legislation which "will permit useful and desirable trusteeships and also to prevent and minimize abuses." S. Rep. 1684, *supra*, at 36; S. Rep. 187, *supra*, at 45, 1 LMRDA Leg. Hist. 441. Two aspects of the careful balance struck by the Committee are of particular moment here.

First, rather than banning trusteeships, the Committee sought to "place[] limits"—or "general tests"—on the

[6] Senator Kennedy's initial bill was drafted "after consultation with a committee of which Professor Cox . . . [wa]s chairman." 1958 Hearings at 36. Thereafter, Professor Cox "assist[ed] . . . both the Subcommittee on Labor and the Committee on Labor and Public Welfare during the markup of the [Kennedy-Ives] bill," 104 Cong. Rec. at 10943, and Professor Cox "assist[ed]" Senator Kennedy on the floor of the Senate during the debate over that bill, *id.* In 1959, Professor Cox continued to "advise[]" Senator Kennedy and the Committee" with respect to the bill, and "was present during the discussion in the committee" and on the floor of the Senate. 2 LMRDA Leg. Hist. 1025. Professor Cox thus became "more familiar with the legislation, probably, than anyone in the country." 1959 Hearings at 110 (Sen. Kennedy).



"reasons for which trusteeships can be imposed"; in so doing the Committee "was careful not to interfere with the necessary and fully legitimate use of trusteeships" or to establish "rigid standards [which] might prevent international intervention when fully justified." S. Rep. 187, *supra*, at 17, 1 LMRDA Leg. Hist. 413; *see* S. Rep. 1684, *supra*, at 10. Thus, § 202 of the Kennedy-Ives bill and the Kennedy-Ervin bill, and § 302 of the bill that was ultimately enacted into law as the LMRDA, 29 U.S.C. § 462, all provided that a trusteeship may be imposed

> for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organizations.[7]

Second, in an effort to "place[] limits on . . . the period for which [trusteeships] may be continued," S. Rep. 1684, *supra*, at 9; S. Rep. 187, *supra*, at 17, 1 LMRDA Leg. Hist. 413, the Labor Committee developed a set of shifting presumptions concerning the lawfulness of trusteeships. For the first eighteen months, a trusteeship is presumed valid and is not to be overturned during that period absent "clear and convincing proof that the trusteeship was not established in good faith and for a purpose allowable under [the substantive limitation on

[7] The Committee also decided, in LMRDA § 303, 29 U.S.C. § 463, to deal directly "with two specific abuses sometimes incident to the imposition of trusteeships." S. Rep. 1684, *supra*, at 11; S. Rep. 187, *supra*, at 18, 1 LMRDA Leg. Hist. 414. Section 303(a)(2), 29 U.S.C. § 463(a)(2), makes it unlawful for an international to transfer money (other than normal assessments) from a local in trusteeship to the international. And § 303(a)(1), 29 U.S.C. § 463(a)(1), makes it unlawful for an international to allow delegates from a local in trusteeship to vote in a convention election of international officers unless the delegates were elected by members of the local.

trusteeships]." *See* § 204(c) of the Kennedy-Ives and Kennedy-Ervin bills, and § 304(c) of the LMRDA, 29 U.S.C. § 464(c).[8] This presumption reflects Congress' sensitivity to "the delicate judgments which international officers are called upon to make in imposing a trusteeship" and Congress' conclusion that because "[t]he initial suspension of local self-government is usually warranted by the needs of the organization . . . it would unreasonably impair the independence of labor unions to allow much scope at this point for the Government to review the judgment of union officials upon the needs of the organization or the best means of effectuating them," S. Rep. 1684, *supra*, at 10; S. Rep. 187, *supra*, at 18, 1 LMRDA Leg. Hist. 414.

At the same time, however, Congress was persuaded that "[t]he local emergency which justifies intervention by the international union can usually be corrected within a year or two." S. Rep. 1684, *supra*, at 10; S. Rep. 187, *supra*, at 18, 1 LMRDA Leg. Hist. 414. For that reason, Congress provided that after eighteen months the presumption is reversed, and a trusteeship is "presumed invalid" absent "clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under [the law]." *See* §204(c) of the Kennedy-Ives and Kennedy-Ervin bills and § 304(c) of the LMRDA 29. U.S.C. § 464(c).

Significantly, in adopting these shifting presumptions, Congress rejected proposals, including one advanced by Senator Knowland, the minority leader, in 1958, *see* S. 3068, § 407(b), 85th Cong. 2d Sess. (1958), to place an absolute limitation on the length of time a trusteeship could last. In his testimony before the Senate Labor Subcommittee George Meany had opposed such an ap-

[8] The presumption stated in text is afforded to a union so long as the trusteeship was "established . . . in conformity with the procedural requirements" of the union's constitution and was authorized or ratified by a fair hearing." 29 U.S.C. § 464(c).



proach, citing instances in which the AFL-CIO had placed a directly affiliated local union in trusteeship and had not been able to lift the trusteeship for several years because of the "problem" the AFL-CIO had experienced in "develop[ing] effective local union leadership." 1958 Hearings at 63. The Committee was persuaded that an absolute limitation on the length of trusteeships was unwise, stating:

> If Communists capture a local union, it may be more than a year before the international officers can build up a group of loyal trade unionists able and willing to govern their own affairs under continued harassment from the Communist minority. Unhappily, the entire leadership of a local may be corrupt and its ouster may leave a vacuum not easily filled. For such reasons, there must be some provision for flexibility. [S. Rep. 187, *supra*, at 18, 1 LMRDA Leg. Hist. 414; *see* S. Rep. 1684, *supra*, at 10.]

(3) For purposes of the instant case, the lesson that emerges from the Title III legislative materials could not be clearer.

In enacting the LMRDA Congress decided to regulate the purposes for which a trusteeship may be established, but *not* to ban trusteeships and *not* to restrict an international's plenary powers over a local in trusteeship. Congress made this judgment with a complete understanding that when a local is placed in trusteeship "local self-government" is "*suspended*" and the international, through the trustee, assumes total authority to "conduct [t]he local's affairs without meetings or elections." Pp. 17-18, *supra*.[9] The authority of the local officers is thus ceded to the trustee during the term of the trusteeship;

[9] Indeed § 303, 29 U.S.C. § 463, makes clear that the trustee is even entitled to appoint the local union's delegates to the international convention rather than allowing the local membership to select delegates, subject only to the limitation that delegates appointed by the trustee are not entitled to vote on the election of international officers. *See also* n.7 *supra*.

to the extent a local official exercises authority during a trusteeship, that authority is derived from the trustee—whose powers are plenary—and not from the local office as such.

Against this background, it would make no sense to conclude that in enacting the LMRDA, Congress authorized an international union trustee to take over the authority of elected local union officials when the local is placed under a lawful trusteeship but that at the same time Congress intended—without ever so stating—to immunize such officials from suspension from office if the officials choose to use their positions to lead a campaign of opposition to the trustee. To the contrary, Congress recognized that removing local officers is often the very point of establishing a trusteeship, and is sometimes necessary precisely because of the direction in which the local officers have led the local. Such situations were among those Congress pointed to in concluding that trusteeships "are among the most effective devices which responsible international officers have to . . . preserve the integrity and stability of the organization," p. 17 *supra*, and that the "initial suspension of local self-government is usually warranted by the needs of the organization," p. 17 *supra*.

Thus, the legislative materials show that Congress understood and anticipated that ordinarily when a trustee is appointed the individuals holding local office would lose not only their power but also their positions; as Professor Cox put it in his testimony, during a trusteeship "there are no local officers," p. 18 *supra*. And to the extent local officers are allowed by a trustee to remain in office, those officials serve at the pleasure of the trustee.

This conclusion is buttressed by interpretive guidelines the Secretary of Labor has promulgated under Title IV of the LMRDA, the Title governing union elections which Title the Secretary is charged with enforcing, *see* LMRDA § 402, 29 U.S.C. § 482. Under those guidelines "[e]stablishment of a valid trusteeship may have the



effect of suspending the operation of the election provisions of the Act." 29 C.F.R. § 452.15. This is true, the Secretary's interpretative guidelines explain, because:

> When the autonomy otherwise available to a subordinate labor organization has been suspended consistent with the provisions of Title III of the Act, *officers of the organization under trusteeship may be relieved of their duties* and temporary officers appointed by the trustee if necessary to assist him in carrying out the purposes for which the trusteeship was established. [29 C.F.R. § 452.15; emphasis added.]

In sum, the only reasonable conclusion in this case is the one reached in *Finnegan*: during a trusteeship local officials whether elected or appointed, occupy a status precisely analogous to the appointed staff in *Finnegan*; thus, just as Title I "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own," 456 U.S. at 442, so, too, Title I does not restrict the freedom of an international union *trustee* to choose subordinate officials "whose views are compatible with his own" to assist the trustee during his tenure. "Nothing in the Act evinces a congressional intent to alter the traditional pattern", *id.* at 442, under which local union officials, both elected and appointed, serve at the pleasure of the international trustee and are subject to suspension if the trustee loses confidence in them. And it is "virtually inconceivable that Congress would have prohibited the long-standing practice" of trustee suspension of disloyal local union officials without "any discussion in the legislative history of the Act," without "some express accommodation to the needs of union [trustees] to appoint and remove policymaking officials." *Id.* at 441 n.12.

Thus, for all of the reasons relied on in *Finnegan*, and also to harmonize Title I with Title III (and with the Secretary of Labor's long-standing interpretation of Title IV), § 101(a)(2), should not be read to preclude an

international trustee from suspending officials of a local in trusteeship who are opposing the policies and activities of the trustee.

D. In holding that, notwithstanding all of the foregoing, the suspension of Lynn was unlawful, the court below proceeded on the premise that the suspension of Lynn from his office is properly characterized " 'as part of a purposeful and deliberate attempt . . . to suppress dissent within the union' " Pet. App. 8a, quoting *Finnegan*, 456 U.S. at 441, which, in turn, quotes *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973). A comparison of *Schonfeld* and this case demonstrates how wrong the court below was to equate the two.

The Second Circuit began its analysis in *Schonfeld* by holding that if the suit "were based solely upon Schonfeld's removal from office or ineligibility to run in the interim election, he would be required to [dismiss] it." 477 F.2d at 903. That court held, however, that the complaint sufficed to state a claim under LMRDA § 101 (a)(2) because the complaint alleged

> that the charges against Schonfeld were pretextual, that they were brought for the purpose of suppressing opposition and dissent within the union, and that they were 'an expression of an anti-democratic policy and practice pursued over the past twenty years' which included a policy of bringing charges or causing charges to be brought against those who exercise freedoms of speech, press and assembly in their opposition. [*Id.*] [10]

[10] As the Second Circuit noted, *Schonfeld* arose out of a union which "had been . . . for many years dictatorially and repressively run by Martin Rarback." 477 F.2d at 901 n.2. When Schonfeld first ran against Rarback, "he was subjected to intra-union discipline"; when Schonfeld eventually succeeded in defeating Rarback in an election, a Trial Board was convened which found him guilty of violating the International constitution, removed him from office, and precluded him from running again for five years.



The Second Circuit emphasized that "[w]e by no means suggest . . . that the free speech rights of union members are threatened or infringed upon every time a political dispute occurs in a union," *id.*; rather "federal court intervention" should be "limit[ed]" to cases

> where union action . . . can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union. We think that the allegations in the complaints here were sufficient to meet this test. [*Id.* at 904]

In the instant case, the courts below found nothing even remotely comparable to the kind of conduct which *Schonfeld* referred to as a "purposeful and deliberate attempt . . . to suppress dissent." Rather, in the lower courts this case turned on the single action of an international union trustee in suspending one local union official.

Thus the holding below necessarily reduces to the proposition that the act of removing any elected official from office for views that official has expressed *ipso facto* constitutes the unlawful suppression of dissent and is *per se* violative of Title I, even when done by an international union trustee to effectuate a lawful trusteeship. The court below all but said as much in stating "while a trustee may remove an elected local officer for financial misconduct, it may not do so in retaliation for the exercise of a right protected by the LMRDA, such as free speech." *Id.* at 13a (citations omitted).

*Finnegan* teaches, however, that the *Schonfeld* test cannot be stretched this far. The *Finnegan* Court held that a union president's action in discharging *every* union staff member who opposed the president's election did not, without more, establish unlawful suppression of dissent, even where the discharges were predicated on a mere suspicion—not confirmed by actual experience—that the

discharged employees would fail to "carry out" [the president's] policies," 456 U.S. at 442. *A fortiori*, an international trustee's action in suspending a single local official who the trustee knew to a certainty was in fact actively opposing the trustee cannot constitute unlawful suppression.

Moreover, by equating an isolated suspension of a single local official with a "purposeful and deliberate attempt . . . to suppress dissent," the decision below flies in the teeth of LMRDA Title III. As we have seen, that Title rests on the assumption that an international union trustee will be free to assure that during the term of the trusteeship those holding local union positions will further the work of the trustee. Thus, Title I cannot be read to place a straitjacket on trustees of the type fashioned by the court below.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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## APPENDIX

The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.*, provides in pertinent part as follows:

### § 3, 29 U.S.C. § 402. Definitions

• • • •

(h) "Trusteeship" means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

### § 101(a)(2), 29 U.S.C. § 411(a)(2). Freedom of Speech and Assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business property before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

### § 102, 29 U.S.C. § 412. Civil enforcement

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court

of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

**§ 302, 29 U.S.C. § 462. Purposes for establishment of trusteeship**

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

**§ 303, 29 U.S.C. § 463. Unlawful acts relating to labor organization under trusteeship**

(a) During any period when a subordinate body of a labor organization is in trusteeship, it shall be unlawful (1) to count the vote of delegates from such body in any convention or election of officers of the labor organizations unless the delegates have been chosen by secret ballot in an election in which all the members in good standing of such subordinate body were eligible to participate, or (2) to transfer to such organization any current receipts or other funds of the subordinate body except the normal per capital tax and assessments payable by subordinate bodies not in trusteeship: *Provided*, That nothing herein contained shall prevent the distribution of the assets of a labor organization in accordance with



its constitution and bylaws upon the bona fide dissolution thereof.

• • • •

**§ 304, 29 U.S.C. § 464. Civil action for enforcement**

• • • •

(c) Presumptions of validity or invalidity of trusteeship

In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462 of this title. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462 of this title. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

# MOTION

No. 86-1940



In The

# Supreme Court of the United States

OCTOBER TERM, 1987

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## MOTION TO DISMISS THE WRIT OF CERTIORARI AS HAVING BEEN IMPROVIDENTLY GRANTED

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION TO DISMISS THE WRIT OF CERTIORARI AS HAVING BEEN IMPROVIDENTLY GRANTED

---

Respondent moves the Court to suspend the briefing schedule and to dismiss the writ of certiorari as having been improvidently granted because, as explained below, the question argued by the petitioner now that the writ has been granted is substantially different from, and much less worthy of plenary consideration than, the question which certiorari was granted to decide.

The petition for a writ of certiorari was granted based on petitioners' representation that there existed a severe split among the courts of appeals concerning an important question of federal law: whether the rule of *Finnegan v. Leu*, 456 U.S. 431 (1982), which limited the rights of appointed union employees under Title I of the Landrum-Griffin Act, also limits the rights of members who have been elected to union office.

Brief reference was made to the fact that the respondent had been removed while his union was in trusteeship, but the thrust of the petition was directed to the broader question of the rights of elected officers versus those of appointees.

Petitioners' brief, however, abandons that broader question and relies entirely on the fact that Lynn was removed from office during the course of an international union trusteeship. No reference is made to the many decisions in the lower courts whose split was the basis for the petition. According to petitioners' brief, this case is about the intersection between Title III of the Landrum-Griffin Act, which regulates union trusteeships, and Title I, the Union Members' Bill of Rights. Petitioners argue that the effect of a trusteeship is to make all elected officers subject to discharge as if they had been appointed, and that the statutory scheme of Title III cannot function effectively if the Union Members' Bill of Rights functions unabated during the course of a trusteeship.

However, these questions have not engendered a split in the circuits. Indeed, although the unions' argument raises an interesting issue, that issue has in fact been the subject of very little litigation of which we are aware. Moreover, petitioners do not cite any lower court authority on the question, and they concede that this Court has never addressed itself either to Title III or to its intersection with Title I. Br. at 8-9. Because the lower courts have had little or no opportunity to grapple with the issue now presented for review, it would be inappropriate for this Court to decide the relationship between Title I and Title III in the first instance. But most important for present purposes, had the Court been aware of the very narrow question that petitioners now consider to be presented by the case, it might well have chosen not to grant plenary review.

Indeed, the Question Presented in petitioner's brief, which focuses solely on the issue of rights during a trusteeship, is



very different from the Question Presented in the certiorari petition itself, which highlighted the issue of elected versus appointed officials. The original Question Presented barely mentioned the trusteeship issue, and that in a parenthetical buried in the middle of a long and complex paragraph. Although the new Question Presented might arguably be comprehended within the old one, it represents such a small portion of the question on which review was granted as to represent a "change [in] the substance" of the previous question presented. Rule 34.1(a).

The Court should not allow petitioners to short-circuit the normal procedures for obtaining review by arguing issues about the meaning of Title III and the effect of a trusteeship on the status of elected officers when those questions would not, had they been presented originally, been deemed worthy of review on their own merits.[1]

## CONCLUSION

The writ of certiorari should be dismissed as having been improvidently granted.

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[1]Respondent has already sought an extension of time to file his brief because his counsel is scheduled to be hospitalized for gallbladder surgery on June 15, 1988. The Court is urged to rule on this motion to dismiss before the end of the Term, before any further briefs will be due.

# MOTION

No. 86-1940

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,

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v.

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*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

---

Respondent Edward Lynn has moved this Court to dismiss the writ of certiorari as having been improvidently granted on the ground that "the question argued by the petitioner [in the brief on the merits] is substantially different from, and much less worthy of plenary consideration than, the question which certiorari was granted to decide." Motion, p. 1. As we proceed to show, that contention is demonstrably false.

1. This action was commenced by respondent Edward Lynn to contest the action of petitioner Sheet Metal Workers International Union ("the International") in

suspeding Lynn from his position as a business agent of Local 75 of the International. The United States Court of Appeals for the Ninth Circuit held that because Lynn was an "elected officer who is speaking not only for himself as a member, but also a representative of those members who elected him," the case was not controlled by this Court's decision in *Finnegan v. Leu*, 456 U.S. 431 (1982), and Lynn's suspension violated § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2) ("LMRDA"). In reaching that conclusion the Court of Appeals specifically rejected the International's contention that because Local 75 had been placed in trusteeship before Lynn was suspended and because Lynn was actively opposing the policies the International trustee was pursuing to resolve the problems that had required placing the Local in trusteeship in the first instance, the International trustee "had the authority . . . to remove Lynn from his post," Pet. App. 8a; the court below stated that "while a trustee may remove an elected local officer for financial misconduct, it may not do so in retaliation for the exercise of a right protected by the LMRDA," Pet. App. 13a.

2. The International petitioned for a writ of certiorari to obtain review of the Ninth Circuit's approach to handling dismissals of elected union officials. We framed the question presented as follows:

> Whether the rule set out in *Finnegan v. Leu*, 456 U.S. 431 (1982), delineating the Landrum-Griffin Act's scope of application to the removal from union office of a union member who holds the office: (i) governs, as the Ninth Circuit has held, only the removal of appointed union officers and not elected officers (*even where subsequent to its elections, a local union has been placed in trusteeship and the elected local union officer who is removed is serving at the trustee's will*); (ii) governs, as the Fifth Circuit has held, the removal of both appointed and elected officers; or (iii) governs, as the Eleventh Circuit has held, the removal of appointed officers and the removal of elected officers in response to those officials' "officer speech"? [Pet. (i); emphasis added.]



And we argued at some length in our petition that the error of the court of appeals was that the court "was so beguiled by the labels 'elected officers' and 'appointed officers' as to completely lose sight of the realities," most notably the fact that "once the trusteeship was accomplished, the local officers served at the pleasure of the International trustee" whose "authority to 'suspend local union officers' is every bit as broad as the removal authority granted the local union president in *Finnegan*." Pet. App. 9-10.[1]

3. In our brief on the merits, we develop at greater length the position staked out in our petition and our reply brief in support of the petition. We first demonstrate that under *Finnegan*, "the determination of what suspensions or removals of union officers or employees constitute an unlawful infringement of membership rights is to be made by evaluating the specific type of union action involved in a particular case" rather than by application of "a broad categorical rule," Br. at 13; *see id.* at 9-14. We then proceed to argue that "the only reasonable conclusion in this case is the one reached in *Finnegan*: during a trusteeship local officials, whether elected or appointed, occupy a status precisely analogous to the apointed staff in *Finnegan*" and may be suspended to the same extent as the appointed officials in *Finnegan*. Br. at 23; *see id.* at 14-24.

---

[1] We reiterated this point in our reply brief in support of the petition, noting that respondent had failed to respond to our showing that "although originally elected to office, [Lynn] was serving at the pleasure of an International trustee at the time of his dismissal" and that therefore Lynn's dismissal "cannot be meaningfully distinguished from the dismissal of the business agents in *Finnegan* and the decision below cannot be squared with this Court's *Finnegan* decision." Rep. Br. at 2.

In order to help focus the Court's attention on what we view as the key to analysis, our brief on the merits restates the question presented by removing the references to the approaches of the various courts of appeals and substituting the following instead:

> Whether the Labor-Management Reporting and Disclosure Act of 1959, as interpreted in *Finnegan v. Leu*, 465 U.S. 431 (1982), prohibits an international union trustee from suspending during the term of a lawful trusteeship, an elected local union official who has used his elected position to oppose the policies of the trustee?

4. As the foregoing shows, respondent could not be more wrong in asserting that "the thrust of the petition was directed to the broader question of the rights of elected officers versus those of appointees" and that only "[b]rief reference was made [in the petition] to the fact that the respondent had been removed while his union was in trusteeship," Motion, p. 2. And respondent is equally wrong in claiming that the International has "abandon[ed]" a "broader question" in favor of a "very different" and "very narrow" question which "represents . . . a small portion of the question on which review was granted." *Id.*, pp. 2-3.

What respondent's argument reduces to is a claim that, in order to keep faith with the petition for certiorari, the International was somehow required to argue that all cases involving the removal of elected union officials are to be treated alike. The fact of the matter is that we have consistently maintained that the court of appeals *erred* in framing such a categorical rule. But given that court's approach, the threshold issue here necessarily is the propriety of distinguishing elected-official removals, as a class from the removal of appointed officials, as a class, and of applying *Finnegan* only to the latter category of cases. That question is, in respondent's words, a "broad[]" one on which the



circuit courts are in disagreement. And that question, as well as the subsequent question concerning the concrete dispute that generated the case—a question which would arise if the Court were to agree with us that a categorical approach to elected-official removals is unsound—are squarely addressed in our brief on the merits.

## CONCLUSION

For the foregoing reasons, the motion to dismiss the writ of certiorari as improving granted should be denied.

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# RESPONDENT'S

# BRIEF

## QUESTIONS PRESENTED*

1. Does the exception recognized in *Finnegan v. Leu*, 456 U.S. 431 (1982), limiting causes of action for violating the free speech guarantees of the Landrum-Griffin Act, that applies to appointed union officials who are removed for opposing the candidacy of their elected superior, extend to elected union officers who challenge their removal from office?

2. May an elected union officer be removed from his position because, during a trusteeship imposed by the national union, he expressed public opposition to a dues increase favored by the appointed trustee?

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*The views expressed in this brief are joined by Teamsters for a Democratic Union ("TDU") and the Association for Union Democracy ("AUD"). TDU is a national organization of rank-and-file Teamsters who seek to reform and democratize their union, and make it more responsive to the membership in collective bargaining; numerous TDU members have been elected to local union office, and their interests would be threatened if the decision below is reversed. AUD is a nonprofit corporation which seeks to further democratic principles and practices in American labor organizations; it is the only organization in the country which does so without taking sides in partisan controversies on the merits of intra-union issues.

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In the

# Supreme Court of the United States

OCTOBER TERM, 1988

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No. 86-1940

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SHEET METAL WORKERS INTERNATIONAL ASSOCIATION and LOCAL 75 OF THE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## BRIEF FOR RESPONDENT

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### STATUTES INVOLVED

In addition to the provisions of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), that are set forth in petitioners' brief, the following provisions of the LMRDA are involved:

§ 101(a)(1), 29 U.S.C. § 411(a)(1), provides as follows:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections and referendums of the labor organization, to attend

membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

§ 306, 29 U.S.C. § 4€6, provides as follows:

> The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity: *Provided*, That upon the filing of a complaint by the Secretary the jurisdiction of the district court over the trusteeship shall be exclusive and the final judgment shall be res judicata.

§ 401(e), 29 U.S.C. § 481(e), provides in pertinent part:

> In any election required by this section which is to be held by secret ballot . . . every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed . . ..)

## STATEMENT

### A. Facts

When this case arose, respondent Edward Lynn was a member of petitioner Local 75 of the Sheet Metal Workers International Association ("Local 75"), a union located in Los Angeles which was affiliated with petitioner Sheet Metal Workers International Association ("International"). Joint Appendix at 31 ("JA 31"). In 1981, respondent was elected to a three year term as Business Representative of Local 75. JA 32.

During the period between January 1981 and June 1982, as a result of high spending, the financial reserves of Local 75



dropped by nearly $9,000 per month, from $250,000 to $90,000. JA 17. Lynn was instrumental in the formation of an intra-union political group, Sheet Metal Club Local 75 (the "Club"), that criticized the level of expenses incurred by local union officers. The Club obtained financial reports submitted by Local 75 to the United States Department of Labor, and it published leaflets which compared the level of local union expenses to those incurred by two other Sheet Metal locals in the Los Angeles area. JA 7-8, 13. The Club charged that expenditures for a Business Manager, two Business Representatives (one of whom was respondent) and one secretary were running at $15,000 per month, which was far in excess of the other two locals. JA 13, 32. As its solution to the fiscal problems, the Club conceded that a dues increase might eventually be needed, but argued that a reduction in expenses was the most immediate imperative. JA 13. Some of the union's officers believed that the solution to Local 75's financial problems was to raise dues rather than to cut their own salaries and expenses. The membership sided with Lynn and the Club, and it rejected three successive attempts to raise dues. JA 8, 14.

Recognizing the local's financial problems, petitioner International imposed a trusteeship on petitioner Local 75, at the request of Local 75's own officers, in order to try to restore the local's fiscal health. JA 14-18. The trustee appointed by the International's president, Richard Hawkins, proposed to remedy the problem by increasing the dues paid by the members rather than by decreasing the expenses incurred by the officers. When Hawkins asked respondent for his support on the dues issue, Lynn stated that he first wanted a commitment to reduce expenditures, such as by reducing the staff, which Hawkins refused to do. JA 33. Consequently, Lynn spoke in opposition to the proposal at a meeting of local union members that had been called to put the dues issue to yet

another vote, JA 33, and the membership voted down the increase by a margin of 130 to 121. JA 34. As petitioners conceded in the district court, Hawkins then summarily removed Lynn from office in retaliation "for opposing Hawkins' policy favoring dues and initiation fee increases." JA 35 ¶ 5, 36 ¶ 6. Following his removal from office, Lynn was never dispatched for work through the union's hiring hall, even though he had the highest classification for referrals and even though other members and even apprentices with lower classifications were repeatedly referred out of the hiring hall ahead of him. JA 10-11.

## B. Proceedings Below

After exhausting his intra-union remedies, respondent sued the International, alleging that the retaliatory removal from his elected position infringed his right of free speech under section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(2).[1] On cross-motions for summary judgment the International argued that, under this Court's decision in *Finnegan v. Leu*, 456 U.S. 431 (1982), Lynn had a claim under section 101(a)(2) only if his personal rights as a member had been diminished, and that his right to speak out as a member had not been impaired by his removal from office but not from union membership. Respondent countered by arguing that *Finnegan* applied only to appointed union employees, and that the removal of an elected officer implicated very different considerations than those which motivated the Court in *Finnegan*. The district court, however, adopted the International's proposed findings

[1]Lynn also advanced other claims against both the local and the International that were rejected by the court of appeals, and that are no longer at issue in the case. Indeed, because the local prevailed on all issues below, and was not a defendant with respect to the one issue which this Court has agreed to consider, it is not clear why the local is a petitioner in this Court.



of fact and conclusions of law as its own opinion, by lining out the words "defendant submits" and handwriting in the words "the court determines that." *See* Joint Appendix in Court of Appeals, at 125.

The court of appeals reversed. It agreed that Lynn could prevail only if he established a violation of his "Title I membership rights," Pet. App. 9a, but it declared that Lynn was exercising his Title I rights by "attend[ing a] membership meeting and participat[ing] in the deliberations and voting upon the business of such meeting," section 101(a)(1), and by "express[ing] at [the] meeting . . . his views, upon . . . business properly before the meeting." Section 101(a)(2). Pet. App. 9a-10a. The court further noted that, although Lynn had not been directly barred from attending or speaking at the meeting, his removal from office forced him to "choose between his rights of free expression and his job." Pet. App. 10a, *quoting Retail Clerks Local 648 v. Retail Clerks*, 299 F. Supp. 1012, 1021 (D.D.C. 1969). As the court of appeals explained, this Court in *Finnegan* had not stated that only a direct infringement of Title I rights was actionable. Rather, "the decision in *Finnegan* was based on Congress' intent in enacting the LMRDA 'that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections.' " Pet. App. 10a-11a, *quoting Finnegan*, 456 U.S. at 441.

In *Finnegan*, the court noted, this objective barred appointed union administrators from complaining that they had been removed from office for campaigning in favor of the incumbent who had appointed them, but whom the electorate had voted out of office. But Lynn, by contrast, had been removed from his office precisely because he had spoken out as a representative of the union members who had elected him to office, and had expressed views that were shared by a ma-

jority of the union membership. Pet. App. 11a. Moreover, the court added, "removal of an elected official for exercising his free speech rights would in effect nullify a member's right to vote for a candidate whose views he supports." *Id.* n.7. Thus, for the very reasons that *Finnegan* created an exception to the right to redress infringements of Title I rights, denying a cause of action in favor of union employees who had been removed from their positions, Lynn's claim alleged a cause of action under Title I of the Act. Pet. App. 11a.

Next the court turned to the International's argument that, even if the removal of an elected official would ordinarily violate the LMRDA, Lynn could be removed because Hawkins was simply acting within his authority as a trustee. The court agreed with the International that the imposition of the trusteeship had not been improper, a point which respondent had never disputed. Pet. App. 12a-13a. But the court went on to conclude that just as an international may not impose a trusteeship for illegitimate purposes, such as suppressing dissent, "so it may not use the powers inherent in a legitimate trusteeship for similarly illegitimate purposes." Pet. App. 13a. Although a trustee may remove an elected officer for proper reasons, "it may not do so in retaliation for the exercise of a right protected by the LMRDA." *Id.* Thus, Lynn's allegations of retaliatory removal stated a claim under the LMRDA, and the district court's grant of summary judgment in favor of the International was improper. *Id.*

Then-Circuit-Judge Kennedy filed a brief dissent. He did not mention the union's argument about the importance of the trusteeship, but concluded that *Finnegan* precludes any Title I claims based on indirect infringement of members' rights. He conceded that a "potential threat to democratic governance . . . may inhere in permitting removals of elected union officials for opposing the views of other union officials," but



stated that such damage to union democracy "does not transform allegations of ouster from union office into a claim for infringement of membership speech." Pet. App. 25a-26a. Unless an officer alleges that his suspension was part of a scheme to subvert the union's basic democratic structure or that his was a nonconfidential and nonpolicy-making position, the injury suffered by removal is primarily connected with his status as an officer, not his status as a member. Pet. App. 26a-27a. According to the dissent, the removal of Lynn for speaking against a dues increase was no more than "a routine dismissal of an officer for failure to implement policy," and the courts should not intrude in "the details of union administration." Pet. App. 27a. Indeed, the dissent concluded, court intervention in union decisions is never appropriate "absent a serious threat to the union's basic democratic structure," because the ultimate power of decision rests with the voting membership of the union who can defeat officers who abuse their power. *Id.*

Respondent moved to dismiss the writ as having been improvidently granted on the ground that the petition sought review of a far broader question — whether *Finnegan* should be extended to elected officers — than has been presented in petitioners' merits brief. However, the Court denied that motion.

## SUMMARY OF ARGUMENT

Petitioners' argument focuses on what they claim to be the only issue in this case, the right of a union trustee to remove an officer of the trusteed union entity who has opposed one of his decisions. Although the Court must ultimately resolve this case by reference to its own particular facts, respondent, together with the Association for Union Democracy and Teamsters for a Democratic Union, believe that petitioners err by skipping a crucial step in the analysis. Before the Court

can resolve the narrow question posed by this case, it must first examine the conceptual underpinnings of petitioners' arguments and resolve the question that was originally presented in the petition for certiorari in this case, *i.e.*, whether *Finnegan v. Leu*, 456 U.S. 431 (1982), should be extended beyond its own facts, which concerned appointed officials, to apply to officers who were elected by the union membership, as respondent Lynn was here.

I. In *Finnegan*, this Court sought to further the basic objective of the LMRDA by construing the right of free speech guaranteed by Title I not to protect appointed union administrators, particularly those occupying policy-making or confidential positions, against patronage-style removals for having opposed the election of an insurgent candidate who defeated the officer who had originally appointed them. In those circumstances, the Court reasoned, the newly elected officer needs to be able to choose new subordinates who he can be sure will help him implement the mandate he has received from the membership. In essence, the Court balanced competing democratic rights, and concluded that the danger that the individual appointed agents and others might be discouraged from exercising their right to support an incumbent candidate was outweighed by the danger that retention of the incumbent's appointees might permit them to frustrate the will of the electorate which turned the incumbent out of office.

Unfortunately, many lower courts have taken their cue, not from the Court's holding or from the purposes which the Court was seeking to advance, but from certain dicta which they have read to suggest that no union officer, elected or appointed, can exercise free speech rights free of fear of retaliatory removal because such removals do not impinge on "membership rights." This extension of *Finnegan*'s dicta to deny free speech rights to elected union officers is unwarranted, for three



important reasons. First, the attempt to distinguish between retaliatory acts that affect membership rights and those which do not is fundamentally misconceived. Second, the very reason why the Court denied protection to appointed administrators — to permit a newly elected officer the freedom to implement his mandate from the electorate — argues in favor of protecting elected officers against removal for having effectively voiced their constituents' concerns. And third, Congress has guaranteed to every member the right to seek and hold union office, subject to "reasonable qualifications uniformly imposed," and support for a dues increase proposed by the head of the union scarcely qualifies as a reasonable qualification.

II. The fact that Lynn's local had been placed in trusteeship affects the analysis of his case, but not the result. Although Congress intended to permit trustees to assume control of a local union so long as the trusteeship was imposed for proper purposes, that control does not comprehend the suspension of Title I rights. Despite the trusteeship, the local union was required to go to the membership for permission to "raise taxes," *i.e.*, to pass a dues increase, and in opposing the proposed increase until the union got a better handle on expenditures, Lynn was not only exercising a right specifically accorded him by Congress, but indeed was urging the membership to exercise a form of control over their union affairs, also guaranteed them by the statute. There is no evidence in the LMRDA or its legislative history that Congress intended to allow the imposition of a trusteeship, even for valid purposes, to result in the suspension of all rights of union members, especially the right to speak freely in opposition to dues increases. Moreover, the right to vote against dues increases by secret ballot would indeed be a hollow right if the trustee could intimidate the most knowledgeable opponent of an increase — an individual who had been elected by the membership to lead them — by threatening to deprive him

of a livelihood unless he pretended that he agreed that an increase was necessary. Thus, the purposes of both Titles I and III are best served by holding that a union officer may not be removed in order to suppress opposition to a proposed dues increase.

## ARGUMENT

### I. TITLE I OF THE LANDRUM-GRIFFIN ACT BARS THE REMOVAL OF AN ELECTED UNION OFFICER IN RETALIATION FOR HAVING EXPRESSED HIS VIEWS ABOUT UNION AFFAIRS.

#### A. The Decision in *Finnegan* Was Intended to Promote Congress' Objective of Ensuring Membership Control of Union Affairs Through Free Speech and Free Elections of Union Leaders.

Respondent's claim in this case must be considered in the context of the events and concerns which led to the enactment of Title I of the LMRDA. The LMRDA, particularly Title I, was the product of hearings conducted in the late 1950's by the Senate Select Committee on Improper Activities in the Labor-Management Field, chaired by Senator McClellan. S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959), *reprinted in* I NLRB, *Legislative History of the LMRDA* 398 (1959) ("*Legis. Hist.*"). The McClellan Committee investigations revealed many different ways in which corrupt union leaders had dominated unions and remained unaccountable to their members. The Committee's hearings specifically addressed the problem of union officers who prevented dissenting members from obtaining employment or who procured the discharge of such members who were already employed. *E.g.*, 10 McClellan Committee Hearings, 85th Cong., 1st Sess. 3759 (August 2, 1957). The Committee also focused on the problem of the removal of elected union officers as a tool of union autocrats to secure their control over the union, to the detri-



ment of the rank-and-file. McClellan Committee, *Second Interim Report*, 86th Cong., 1st Sess. 384-386, 514 (1959).

Unfortunately, high-ranking union officials do not always subscribe to democratic views of what is in the best interest of their members. According to one widely held view,

> labor unions should be regarded as military organizations, for their function is to wage economic warfare with employers . . .. As a wartime army can neither brook divided leadership nor tolerate active dissidents so must a union punish the trouble-makers in order to close ranks against employers and rival organizations.

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 829 (1960).[2] But when it enacted the LMRDA, Congress rejected that view and concluded that workers' needs would be better served by truly democratic unions in which policies were formulated and adopted after open discussion, debate, and criticism. *Id.*

As reported by the Senate Committee on Labor and Public Welfare chaired by Senator John F. Kennedy, the bill deliberately omitted any Bill of Rights for union members. Instead, the Committee sought to minimize judicial intrusion in internal union affairs, proposing instead to simply require unions to follow Ethical Practices Codes such as those adopted by the AFL-CIO. S. Rep. 187, 86th Cong., 1st Sess. 7 (1959), *reprinted in* I *Legis. Hist.* 403. *See* Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 Minn. L. Rev. 199, 206 (1960). However, in a stunning defeat on the floor for Senator Kennedy and the AFL-CIO, the Senate repudiated this approach by adopting the Bill of Rights proposed by Senator McClellan. *Steelworkers v. Sadlowski*, 457 U.S. 102,

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[2]Professor Archibald Cox served as "a principal consultant to the draftsmen" of the LMRDA. *Trbovich v. United Mine Workers*, 404 U.S. 528, 535 (1972).

109-110 (1982). Although organized labor regained some ground by obtaining the passage of a substitute amendment authored by Senator Kuchel (with Senator McClellan's assent), II NLRB, *Legis. Hist.* 1239 (1959), this course of events makes both the Senate Report, and Senator Kennedy's attempts to limit the damage done to his original position by the Bill of Rights by emphasizing how little Title I actually accomplishes, unreliable guides to Congress' intent.[3]

There are only a few fragmentary pieces of legislative history that bear directly on the issue of removal of elected union officers. *See* Levy, *Legal Responses to Rank-and-File Dissent*, 30 Buff. L. Rev. 663, 680-684 (1981). Rather than relying on such inconclusive evidence, this Court has construed the Act in light of its broad remedial purposes. *E.g.*, *Wirtz v. Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). And Congress' primary objective, as the Court has repeatedly stated, was "to protect the rights of rank-and-file members to participate fully in the operation of their union through the processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492, 497 (1968). This objective was to be achieved by guaranteeing members the right of free speech and other basic individual rights, and by ensuring that unions would be governed by officers who had been elected in free and fair elections. *Teamsters Local 82 v. Crowley*, 467 U.S. 526, 539 (1984).

These were the concerns that animated the Court's decision in *Finnegan*, 456 U.S. at 436 (statute's objective was

[3]Similarly, the majority report of the House Committee accompanied H.R. 8342, which was rejected on the floor of the House in favor of the Landrum-Griffin substitute amendment, II *Legis. Hist.* 1691-1692; McAdams, *Power and Politics in Labor Legislation* 231 (1964), and so should not be given much weight concerning Title I.



"ensuring that unions would be democratically governed and responsive to the will of the membership"). In that case, several business agents who had been appointed by Brown, the leader of the local, campaigned for Brown's re-election and in opposition to the election of Leu, Brown's opponent. After Leu defeated Brown, he fired Brown's appointees, having concluded that they would be loyal to the incumbent who had appointed them and that he could not rely upon them to follow his own policies and programs. 456 U.S. at 433-434. The terminated business agents sued, claiming that Leu had removed them in retaliation for their exercise of their right under section 101(a)(2) to express their views about candidates in a union election.

This Court held, however, that union leaders may discharge such appointed employees, even for the purpose of retaliating against those who supported another candidate in the union election. That rule is needed to protect a vital component of union democracy: the right of an elected union leader to select policy-making subordinates based on their political loyalty. *Id.* at 441. Because that process is necessary to achieve a congressional objective, even though it otherwise penalizes the exercise of free speech rights in some cases, on balance the threat to the implementation of the electorate's mandate outweighs the chilling effect of the reprisals, and so dismissal from union employment in that situation does not violate section 101(a)(2). But in the course of recognizing such an exception in *Finnegan*, the Court also indicated that, if the discharge creates a greater-than-normal impact on the rights of members, and thus outweighs the democratic value of picking loyal subordinates, the discharge may be invalid. As examples of improper discharges, the Court included those that resulted in a denial of the individual's status as a member, those involving nonpolicy-making employees, and those based on an overall scheme to suppress dissent within the union.

The dissent below, however, placed undue reliance on the portions of the *Finnegan* opinion that refer to "membership rights" and concluded that retaliatory removal from union office, whether appointed or elected, and indeed, other kinds of union actions against their members, should be permitted unless the member can establish that the union's action "directly" affected his "membership rights." Pet. App. 25a-26a. Petitioners ask the Court to follow the same analysis. Br. at 13. Although respondent believes that he could win even on those grounds, the attempt to discern whether "membership rights" are affected in each case is a fundamentally misguided approach. Indeed, the use of labels such as "direct" and "indirect" is often just a way of "stating, rather than of reaching, a result." *Wickard v. Filburn*, 317 U.S. 111, 123 (1942). *See also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (explaining why "general expressions" in *Marbury v. Madison* that "go beyond the case . . . may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

In the following section of this brief, we explain why the "membership rights" approach is erroneous, and why *Finnegan* does not require it. In section C, we explain why the removal of an elected officer is fundamentally different from the removal of an appointed administrator. Finally, in part II we apply the principles developed in sections B and C to show why Lynn was protected against the particular removal at issue here.

### B. *Finnegan* Does Not Require a Showing of Direct Impact on "Membership Rights" in Every Title I Case.

Before turning to a careful reading of *Finnegan*, we present a simple hypothetical that points up the inadequacy of any attempt to create a bright line test for all Title I cases



based solely on a distinction between loss of "membership rights" and other kinds of injuries. Even petitioners, we trust, would concede that a union member who is beaten or deprived of a job (other than with the union) for having expressed views about union leaders at a union meeting, may claim the protection of Title I. *Shimman v. Frank*, 625 F.2d 80, 90 (6th Cir. 1980); *Murphy v. Operating Engineers*, 774 F.2d 114, 122-123 (6th Cir. 1985). Certainly, the legislative history makes it clear that one aim of Title I was to provide members with protection against beatings and employment-related reprisals simply because they spoke out against the leadership, II *Legis. Hist.* 1098 (Sen. McClellan, introducing his Bill of Rights on the Senate floor), 1103 (Sen. McClellan, explaining the purpose of section 101(a)(2)), 1113 (Sen. Kennedy, objecting to section 101(a)(1)). Indeed, in a brief submitted this very Term, the AFL-CIO has argued that

> one of the principal reasons that Title [I] was enacted was to protect dissident members from economic reprisals by unions . . .. [A]n allegation that a union has sought to blacklist or procure the discharge of a dissident member clearly states a claim for relief under Title I.
>
> *Reed v. UTU*, No. 87-1031 (S. Ct.), Brief of AFL-CIO as *Amicus Curiae*, at 18.

Title I protects a member against such reprisals even though a punch in the nose or loss of work does not alter the member's status as a member of the union; nor do union membership rights include a guarantee that a worker will not obtain a broken nose or an entry on a blacklist. The reason why there is a violation of Title I in these circumstances is that the nose was broken, or the blacklist created, *because* the individual exercised the membership right of expressing views about the union's leadership. If that is so, that result is inconsistent with

the notion that removal from union office because a member exercised free speech rights is not a violation of Title I because it does not interfere with "membership rights."

Nor, we assume, would the courts impose a requirement that a member whose nose was broken must show the existence of a broad pattern or scheme to suppress dissent throughout the union before the member may be awarded damages or obtain relief to prevent future assaults. Whether or not there is such a scheme, and whether or not union-wide suppression is the objective of the punch or the blacklisting, a single punch or a single economic reprisal, with or without such a scheme, surely chills dissent on the part of the individual punished and of those who witnessed it.

What this hypothetical indicates is that lower courts have erred in concluding that this Court meant to say that in no case can a union's action be considered a violation of Title I unless it alters the member's status as a member of the union (or unless there is an overall scheme to suppress dissent). Rather, the requirements of showing a violation of "membership rights" or of a "scheme to suppress dissent" were intended to be limitations on *Finnegan*'s exception to the general rule against employment-related reprisals, allowing the discharge of certain appointees based on their exercise of the right to dissent from leadership decisions and recommendations.

The issue in *Finnegan* was whether the free speech provisions of the LMRDA bar an elected union leader from dismissing policy-making appointees who do not support the leader politically. Specifically, the question was whether a union leader could fire business agents — appointees whose policy-making tasks include negotiating collective bargaining agreements and deciding which grievances should be taken to arbitration — because they had opposed him for election. The Court first



considered the claim that such discharges constituted a form of "other discipline" that would, if imposed for the exercise of Title I rights, be forbidden by section 609 of the Act, 29 U.S.C. § 529. This construction of the statute was rejected because there is strong legislative history showing that the sponsors of the Act were concerned about preventing unions from immediately suspending corrupt union officials and not giving them further opportunities to steal union funds pending a due process hearing. *See Wood v. Dennis*, 489 F.2d 849, 858 and n.4 (7th Cir. 1973) (Then-Circuit-Judge Stevens, concurring). Thus, they assured their fellow members of Congress that the language "otherwise discipline" in section 101(a)(5), 29 U.S.C. § 411(a)(5), did not apply to "suspension of a member's status as an officer of the union." 456 U.S. at 438, *quoting* H.R. Conf. Rep. No. 1147 at 31, *reprinted in* 1 *Legis. Hist.* 935. This and other portions of the legislative history showed "that the virtually identical language in § 609 was likewise meant to refer only to punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee." *Id. See also id.* at 437-438, where the Court stated that section 609 "refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union . . . . [D]ischarge from union employment does not impinge upon the incidents of union membership." (emphasis in original).

This aspect of *Finnegan* does not, however, undercut the decision below. First, respondent's claim here is based on section 102 of the LMRDA, 29 U.S.C. § 412, which provides a cause of action when a union "infringes" Title I rights; it is not based on section 609 which requires a showing of "discipline." Second, the Court's discussion of the scope of section 609 was informed by its review of the legislative history which shows Congress' intent *not* to subject the suspension of union officers to the requirements imposed on union ac-

tions that do constitute "discipline." Neither petitioners nor the dissent below have pointed to any comparable legislative history here, and, as we have shown above, "Congress recognized that interference with employment rights constituted a powerful tool by which union leaders could control union affairs," *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1378 (8th Cir. 1978), and it intended Title I to protect union members from employment-related reprisals because of their exercise of free speech rights. Moreover, the legislative purpose of facilitating membership control of their own organizations is scarcely supported by the removal of the very officers to whom the members have voted to entrust the affairs of the union; rather, "the more democratic result would obtain were the membership able to retain its authority over elected positions." *Brett v. Hotel Employees Local 879*, 828 F.2d 1409, 1415 (9th Cir. 1987). Accordingly, *Finnegan*'s discussion of the limits of section 609 does not bar all claims under Title I based on reprisals with respect to employment.[4]

Indeed, in the next portion of *Finnegan*, the Court expressly noted that the term "infringe" in section 102 is broader than the term "discipline" in section 609. 456 U.S. at 439. The Court found it unnecessary to decide how much broader section 102 may be because it found that allowing the discharge of union business agents based on their political views was consistent with the objectives of the LMRDA. Again unlike the plain legislative history showing congressional desire both to prevent employment-related reprisals generally, and to protect members' rights to choose their own officers, the Court

[4]One court, relying on *Finnegan*'s dicta, has even said that blacklisting is not forbidden because it does not affect the member's status as a member. *Allen v. Allied Plant Maintenance*, 636 F. Supp. 1090, 1097 (M.D. Tenn. 1986). This ruling is plainly wrong, as even the AFL-CIO conceded in *Reed*, *supra* at 15.



noted that nothing in the legislative history of the Act showed any congressional intent to alter the traditional practice under which union leaders could appoint business agents of their own choice. Indeed, the Court concluded, "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of a union election." *Id.* at 441-442. However, the Court reserved the question of what result would obtain if there were a "purposeful and deliberate attempt . . . to suppress dissent within the union," or if the employees did not hold policy-making or confidential positions. *Id.* at 441 and n.11. In those cases, there would be a greater chilling effect, and the danger of frustration of the voters' will by retaining employees from a previous administration would be significantly less, and so the balance of the membership's interests would be significantly different. However, on the facts of the case before it, the Court held that section 102 did not forbid the discharge of union business agents for supporting the losing candidate in a union election.

Particularly in the area of labor law, there is a certain danger in relying on a literal reading of the Court's opinions, without taking into consideration the objectives which the Court was trying to advance. *See West v. Conrail*, 107 S. Ct. 1538 (1987) (rejecting a literalistic reading of *DelCostello v. Teamsters*, 462 U.S. 151 (1983)). *Finnegan* itself was addressed to appointive positions within a union, and as we demonstrate in the next section of the brief, this case presents a very different set of circumstances because the position was elective. *See Wood v. Dennis*, 489 F.2d 849, 858 (7th Cir. 1973) (Then-Circuit-Judge Stevens, concurring).[5]

[5]Lynn's position as a business representative was plainly a policy-making position within the union. Accordingly, we concede that if Lynn had been appointed rather than elected to his position, *Finnegan* would permit his discharge unless part of a scheme to suppress dissent.

**C. The Removal of an Elected Officer Because the Officer Expressed His Views About Union Affairs Violates Title I Because It Seriously Injures the Rights of Union Members, Including Both the Officer Himself and the Members Who Elected Him.**

The previous section of this brief demonstrated that *Finnegan* does not compel the conclusion that an elected officer may be removed from office because he expressed disagreement with the views of other officers. As we now show, extending *Finnegan* to the removal of elected officers would have serious consequences both for the rights of union members and, more important, for the system of union democracy, especially when the basis for the removal was the officer's position on a dues increase.

First, and most obviously, removal of an elected officer because of expressions of opposition to the views of other union officers will have the effect of discouraging that officer, and other members, from exercising their free speech rights. If the officer held a full-time, salaried position with the union, his removal from office also involves the termination of his gainful employment. The loss of a union position paying $50,000, as in this case, JA 13, or the threat of such loss, may have an effect far more severe, and may be far more intimidating to others who are contemplating expressions of dissent, than a fine of a few hundred dollars.

The loss of a position with the union may also be followed by an inability to be reemployed in the industry with which the union bargains, for a variety of reasons. First, although some collective bargaining agreements provide for leave from a worker's position with the employer for the period of service in union office, with a guarantee of return after the union position expires and without loss of seniority, many contracts do not. *See* Bureau of National Affairs, *Basic Patterns in Union*



*Contracts 74* (1986).[6] Second, it is not unusual, as happened to respondent Lynn, for the union hiring hall to be mysteriously unhelpful to the departed union officer in ways which, although unlawful, may be difficult to prove. And, particularly when the officer's views have been critical of the employer's labor relations policies, or when the employer decides that it would rather try to get along with the new union leader, the deposed officer may discover that there are no employers willing to offer him work within any bargaining unit represented by the union. Finally, exclusion from jobs covered by the union's collective bargaining agreement often leads to loss of union membership or at least voting privileges, because many union constitutions either require work within the trade as a condition of union membership, *e.g.*, Teamsters Constitution, Article XVIII, Section 6(a), or at least limit full membership rights to members who are actively working. *Williams v. ITU*, 423 F.2d 1295, 1298 (10th Cir. 1970).

This effect of removal on the union officer alone should be enough to warrant protection under the LMRDA because, as the court said in *Wood v. Dennis*, 489 F.2d 849, 854 (7th Cir. 1973),

> There is certainly no legislative history to indicate that officers forfeited their Title I rights to equal membership rights and free speech by the mere act of becoming union officials. . . . Ultimately, it is not

[6]On the other hand, if the union office is a part-time position, and the worker continues to be employed by his original employer, many union contracts provide for superseniority for union officers which protects them against layoff. *Dairylea Coop.*, 219 NLRB 656 (1975), *enf'd sub nom. NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976). *See also* Lynn Deposition at 64. In those circumstances, loss of a union position may mean immediate layoff. *E.g., Brett v. Hotel Employees Local 879*, 828 F.2d 1409, 1412 (9th Cir. 1987). The BNA survey cited in the text found, at 68-69, that one-third of all collective bargaining agreements provided superseniority for union officers.

> only free speech and union democracy, but the unions themselves, which will be aided by a decision allowing [a] limited right of action to remedy the injury of removal from union office when that removal is motivated by a desire to chill membership rights, such as the right of free speech.

But beyond the effect of the removal on the officer himself is the potential impact on the freedom of speech of his constituents. This Court acknowledged a similar impact in *Hall v. Cole*, 412 U.S. 1, 8 (1973):

> When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others.

So in the case of a retaliatory removal of an elected officer for disagreeing with leaders at a higher level, those members with insecure jobs and other officers on the union's governing tribunal who might have shared similar views will be far more reluctant to express them. The chilling effect is even greater if the justification for allowing retaliatory removals is that, as petitioners have argued, loss of employment has only an "indirect" effect on free speech rights, and indirect effects are not enough to warrant legal protection.

But regardless of whether the officer is denied all employment and not just his elected union position, the punishment of an officer will have a chilling effect on the membership. Union democracy is, after all, a luxury, while gainful employment is a necessity, and members who see an apparently powerful officer whom they have elected to office tossed aside because he spoke out on their behalf, may well come to the conclusion that it is not worth taking the chance of speaking out, with



at best a hope that they might ultimately have their own rights vindicated in court. In this way, the voices of dissent within the union generally, and on its governing tribunals in particular, are effectively stifled, and political unanimity is restored, by the more powerful union bosses who ordered the removal. But this result is hardly consistent with democratic principles. As Chief Judge Lumbard noted, "once suppressed, the democratic spirit may not soon be revived." *Navarro v. Gannon*, 385 F.2d 512, 520 (2d Cir. 1967).

The chilling effect on the rights of individual members caused by a removal from elective union office is not dissimilar, of course, to the effect of loss of a union appointment which was at issue in *Finnegan*.[7] One aspect which distinguishes this case from *Finnegan* is that, although there is no right to be appointed to union office, section 401(e) of the LMRDA guarantees "every union member in good standing [the right to] be eligible to be a candidate *and to hold office* (subject to section 504 and to reasonable qualifications uniformly imposed) . . .." (emphasis added). Similarly, the International's Constitution also gave Lynn the right to seek and hold this office. By removing respondent Lynn from office, petitioners plainly deprived him of this membership right.[8]

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[7]Indeed, in *Finnegan* the Court recognized the potential chilling effect when it cited an observation to that effect in *Retail Clerks Local 648 v. Retail Clerks*, 299 F. Supp. 1012, 1021 (D.D.C. 1969), *quoted in Finnegan*, 456 U.S. at 440, although the Court ultimately concluded that the risk of such a chilling effect was outweighed by other considerations.

[8]Respondent's reliance on Title IV to support his argument that the union's retaliation against his exercise of free speech rights deprived him of a membership right, does not preclude him from seeking to enforce his Title I rights by filing his own action in district court. As this Court decided in *Teamsters Local 82 v. Crowley*, 467 U.S. 526 (1984), to the extent that there is some overlap between the requirements of Title I and Title IV of the Act, Title I actions are precluded only if "the remedy sought is invalidation of the election," *id.* at 550, or if it would "substantially delay[ ]

Lynn's failure to support the dues increase proposed by petitioners' trustee cannot possibly be construed as a failure to satisfy a "reasonable qualification" of the kind authorized by section 401(e). As this Court has repeatedly stated, "Congress plainly did not intend that the authorization of 'reasonable qualifications' should be given a broad reach." *E.g., Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 309 (1977). In particular, the Court has refused to permit union leaders to create "qualifications" that permit them to determine who may hold subordinate elected positions based on considerations of political loyalty. *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492, 502-503 (1968).

Thus far we have focused on the potential impact of retaliatory removal of elected union officers on the rights of individual union members. But, as important as such deprivations may be, even more important is the effect of such removals on the system of union democracy, and thus on the achievement of Congress' objective of fostering the development of democratic structures that would restore control of unions to the rank-and-file. The removal of dissenting officers has the potential for a severe debilitation of the membership's control because of two key features of unions' political structure, which we more fully explain below: representative government and one-party democracy.

First, most unions manage to attract only a small fraction of their members to meetings, e.g., *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 312 (1977), and so most important union decisions are made by representative bodies or even by a single executive officer at the top of the union hierarchy.

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or invalidat[e]" the election. *Id.* at 546. The relief sought here will neither delay nor invalidate any election. Accordingly, respondent is entitled to sue under Title I to redress a deprivation, for reasons forbidden by Title I, of the membership right to hold office which is guaranteed by Title IV.



Levy, *Legal Responses to Rank-and-File Dissent*, 30 Buff. L. Rev. 663, 666-675 (1981); Hartley, *The Framework of Democracy in Union Government*, 32 Cath. L. Rev. 13, 62-92 (1982). Indeed, although there remain a few unions that are so small and confined to a single workplace that it would be theoretically possible to bring all the members to a single meeting, most local unions would find it impossible to fit all the members into a single room even if all the members desired to attend a meeting and the leaders wanted to encourage their attendance. Thus, as this Court has noted in the past, in enacting the LMRDA Congress did not seek to require government by a series of town meetings, but rather it recognized that unions have adopted a representative system of government. *Musicians v. Wittstein*, 379 U.S. 171, 182 and n.21 (1963).

The second important feature of democracy in the union context is that, as Professor Clyde Summers has explained, unions are one-party political states. Summers, *Democracy In A One-Party State: Perspectives From Landrum-Griffin*, 43 Md. L. Rev. 93 (1984); *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 311 and n. 7 (1977).[9] As Professor Summers argues, in order to achieve Congress' objective of fostering democratic control of unions, the courts must not be blind to the political realities within which union democracy must function or to the differences between a union's one-party structure and the two-party structure of federal and state governments. *Id.* at 118. Thus, he suggests,

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[9]Professor Summers was a member of the special committee formed by Senator Kennedy and chaired by Professor Cox that advised the Senate Committee in drafting the legislation, and was the author of a "Bill of Rights for Union Members" published by the American Civil Liberties Union that became the basis for Senator McClellan's floor amendment. His pioneering scholarship was cited in the debates on the floor. *E.g.*, II Legis. Hist. 1113.

> the law cannot be paralyzed by nominal neutrality between the incumbents in control and the opponents who challenge their control. The function of the law must be to loosen the grip of oligarchy so that those opposed to the incumbents can make their voices heard and the weight of their opposition felt.
>
> *Id.* at 99.

Given these two features of unions, protection for the speech rights of elected officers is crucial. First, when the officer expresses his views, he will normally be speaking for his constituents. A would-be business representative such as respondent normally campaigns for office on the basis of service to members, knowledge of the bargaining agreement, militancy in representing members, and political positions on intra-union matters. If elected, the business representative is committed to representing the point of view of his constituency, and the constituency, for its part, expects the officer to do just that. As the court said in *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1282 (2d Cir. 1974), "The duly elected officers of a union have a right and a responsibility to lead, and to give the members the benefit of their advice on questions that arise." By removing the elected representative simply because of his point of view, a union infringes the LMRDA rights of the membership as a whole to participate in the union's decision-making in the union's governing tribunals, section 101(a)(1), and to support and elect candidates whose views they happen to share. Section 401(e). *See Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967).

Indeed, the retaliatory removal of a dissenting officer for expressing a particular viewpoint may well make it much less likely that such a view will be given serious consideration in



the union's decision-making process. When a single member raises his voice in opposition to the policies of the incumbent leadership, that voice of opposition may not even be heard, or at least recognized, by the leadership. But when an elected official who represents the views of a sizable block of members raises his voice in opposition to the views of other officials, the odds are much better that that voice will be heard and the opposition felt. If democracy is to thrive in the union, the rights of the speaker to continue to speak on behalf of his constituents from the same platform, and with the same political authority, must be preserved until such time as the members decide at the polls to withdraw their support of the speaker.

Another way in which the removal of an elected officer may cripple union democracy is that, because only union officials can personally participate in most aspects of union governance, access to sufficient information to make politically credible objections is regularly available only to union officials. The facts of a leading Title I case, *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963), illustrate this point. In the course of examining canceled checks, Salzhandler, the financial secretary of Painters Local 442, found indications that the local's president had embezzled funds. When Salzhandler published his findings, the union stripped him of his elected office and suspended him for five years, actions which the courts eventually overturned. Obviously, if Salzhandler had not held the office in the first place, he would never have obtained the information and the membership would have been the poorer for it; and even if the union limited itself to removing him from office, it would have severely impinged on the democratic rights of the membership as a whole. Thus, the removal of a dissident officer cuts off a crucial source of information to the rank-and-file membership, thereby denying them their right to make informed decisions about union affairs in the next election or

other membership vote. *Blanchard v. Johnson*, 388 F. Supp. 208, 214 (N.D. Ohio 1975), *aff'd in relevant part*, 532 F.2d 1074, 1079 (6th Cir. 1976).

The membership's interest in obtaining candid views from their elected officers was especially great in this case, where the issue was whether they should consent to increased taxation in the form of a dues increase. The membership is expressly guaranteed the right to vote on dues changes, section 101(a)(3), thus making it one of only two matters expressly committed to the union membership by the LMRDA; the other is the election of officers. Moreover, it is the elected officers who can best inform the membership what the actual financial requirements of the union are, and whether the union can afford to cut expenses, including their own and others' salaries, rather than increase dues. For the union to try to censor the one officer who disagreed with the need to increase dues, and to use the threat to Lynn's livelihood as a means to try to present a false image of unanimity among the officers, was truly an effort to impose "taxation without representation."

Additionally, as a general rule, persons serving in lower-level, elected union positions comprise the pool from which candidates for the top offices in the union hierarchy are chosen. *E.g. Newman v. CWA Local 1101*, 99 LRRM 2755, 2762 ¶ 39 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 833 (2d Cir. 1979); Edelstein & Warner, *Comparative Union Democracy* (1976). Only an individual who has had the opportunity to demonstrate his skill in a lower union position, and to acquire knowledge of the problems facing the unions, as well as visibility to the full membership, is likely to be entrusted with the reins of power held by the highest elected officers. If the top union leadership can eliminate members of a dissenting group as soon as they begin to gain a foothold in the union hierarchy after being elected to represent a limited constituency within the union,



the leadership can better protect itself against future electoral challenges. Thus, for example, members of Teamsters for a Democratic Union could be picked off one by one, each time they defeat a corrupt local union officer, and the rank-and-file would never have the opportunity to clean up their own union. Indeed, if national leaders could remove the leaders of dissident locals simply because they were dissidents, they would never have to resort to trusteeships and risk a lawsuit under Title III of the Act.

The use of retaliatory reprisals against elected officers to manipulate the results of a union election is further illustrated by *Yablonski v. UMW*, 71 LRRM 3041 (D.D.C. 1969). Yablonski was an elected member of the union's executive board whose union duties, as head of its political action committee, gave him extensive opportunities for contact with members and officers throughout the nation. When he announced his candidacy for the union's presidency, the incumbent removed him from his position and assigned him to work within a single union district, under the supervision of one of the president's political allies who could then keep track of his activities. Yablonski sued and the court ordered him reinstated to his former duties, recognizing that his ability to campaign would be significantly impaired if the president could essentially send him to Siberia because of his candidacy.

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In summary, then, the removal of an elected union officer solely because the officer has expressed disagreement with the views of other elected officers not only violates the rights of the individual officer who has been removed, but also poses a serious threat to the rights of other union members and to the system of union democracy itself. Moreover, the Court's decision in *Finnegan v. Leu* does not authorize retaliatory

removal of elected officers. Accordingly, the Court should hold that an elected officer who, like Lynn, is removed from office because he gives union members the benefit of his candid advice on an issue on which the membership must vote, states a claim under Title I.

This is not to say that elected union officers may never be removed from office short of a recall election. Congress obviously contemplated that elected officers would be subject to removal for serious misconduct, section 401(h), and indeed the International's Constitution authorizes the removal of elected officers for cause, subject to the right to a full hearing before a union tribunal. Article 3, Section 2(a). There may even be some kinds of speech by elected union officers that would warrant removal from office under the proviso to section 101(a)(2) which subjects the right of free speech to "reasonable rules" governing the member's responsibility to the union as an institution and preventing interference with the union's performance of its legal or contractual obligations. *See Maceira v. Pagan*, 649 F.2d 8, 14-18 (1st Cir. 1981); *Wood v. Dennis*, 489 F.2d 849, 855-856 (7th Cir. 1973). Lynn's statement of opposition to a dues increase, however, did not interfere with the interests protected by the provisos, but simply advocated one point of view about how the union ought to proceed as an institution. Therefore, he should not be subject to removal from his elected position for having stated his opinion.



## II. A UNION TRUSTEE MAY NOT REMOVE AN OFFICER WHO WAS ELECTED BY THE MEMBERSHIP OF THE TRUSTEED LOCAL SIMPLY BECAUSE THE OFFICER OPPOSED A DUES INCREASE THAT WAS ADVOCATED BY THE TRUSTEE.

In Part I of this brief, respondent demonstrated that, at least in normal circumstances, a union may not remove one of its elected officers simply because the officer has exercised his Title I right to disagree with other officers. Without ever expressly repudiating this position, petitioners suggest that, whatever rule may prevail with respect to other elected officer removal cases, the Court should address only the particular facts of this case by deciding that the imposition of a trusteeship makes this case analogous to *Finnegan v. Leu*. Br. at 7, 13. Thus, according to petitioners, by enacting Title III of the LMRDA, Congress intended to permit trustees to exercise total power within the trusteed local, including the right to remove elected officers for any reason whatsoever in order to carry out the trustee's objectives or policies. Br. at 21. Elected officers in a trusteed union thus become analogous to appointive employees in a politically unencumbered union, and the appointed trustee should be permitted to impose his political will *vis-a-vis* the officers of the trusteed local.

This argument has several flaws, but before discussing them, we wish to emphasize at the outset that the precise scope of a trustee's power pursuant to Title III, and the nature of the democratic rights of the members that survive a trusteeship, are matters that have engendered relatively little litigation in the lower courts. Even in this case little attention was given to this issue below. Thus, insofar as the Court addresses this issue, it will be writing on a more or less clean slate,

without the benefit of development by other courts or by commentators, and without the views of the Secretary of Labor, who has enforcement authority under Title III. We thus urge the Court to exercise caution in this first foray into relatively unexplored territory. For these reasons, we do not attempt an exhaustive discussion of Title III here; we only seek to demonstrate that the title was not intended to allow international unions to obliterate democratic speech rights of local union members, including those holding elective offices.

Petitioners rely heavily on portions of the legislative history which, they suggest, indicate that, when enacting Title III, "Congress decided to regulate the purposes for which a trusteeship may be established but . . . not to restrict an international's plenary powers over a local in trusteeship." Br. at 21. This statement is only partly correct. It is true that Title III itself imposes few restrictions on an international's conduct during a trusteeship, but that is because the remainder of the LMRDA significantly restricts the powers which an otherwise autocratic union leader may exercise *vis-a-vis* the membership. Petitioners do not cite a single case, or a single piece of legislative history, which suggests that Congress intended to permit a trustee to run roughshod over the rights created by the other titles of the LMRDA.

Most of the legislative history cited by petitioners is from the period of time before the Union Members' Bill of Rights was added to the bill. To the extent that the speakers failed to address the question of whether a trustee could violate the individual rights of members of local unions, including members who had been elected as officers, that is simply because the issue of individual rights had not yet been addressed by Congress acting as a whole. And even then, although the proponents of the bill stated that "corrupt local officials" could be removed, they also indicated that the bill "would require



the international officer to justify such action when it becomes necessary." 104 Congressional Record 18280 (1958) (Rep. Santangelo).

Petitioners place their strongest reliance on a fragment of the testimony of Archibald Cox before the Senate Committee, to the effect that during a trusteeship "there are no local officers [or] elections [or] union meetings; and when union meetings are held the members may not be allowed to vote." Br. at 18. But Professor Cox was not describing the regime which Congress sought to implement by passing Title III; rather, he was describing the abuses which Title III was meant to prevent. *See also* H. Rep. 741, 86th Cong., 1st Sess. 13, I *Legis. Hist.* 771 (bill passed because "trusteeships have been used as a means of . . . preventing growth of competing political elements within the organization"). Indeed, if petitioners were correct that a trustee properly installed under Title III could override the democratic protections guaranteed by the remainder of the LMRDA, members as well as officers could be removed for exercising democratic rights, members could be fined or expelled without due process, and indeed dues rates could be raised without the consent of the membership. A trusteeship may not be imposed in order to accomplish these objectives, *McDonald v. Oliver*, 525 F.2d 1217, 1232 (5th Cir. 1976); *Carpenters v. Brown*, 343 F.2d 872, 883 (10th Cir. 1965), and nothing in the legislative history suggests that Congress intended Title III to permit international unions to accomplish indirectly that which they are forbidden to do directly.

Indeed, Section 306 of the LMRDA, 29 U.S.C. § 466, expressly provides to the contrary: "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity." Senator Goldwater's analysis of the statute makes it clear that section 306 was intended to preserve both federal and state law. II *Legis. Hist.*

1849. Indeed, Senator Morse, in defending the trusteeship provisions of the Senate Committee's bill against an amendment, emphasized that the Senate "should look at the trustee section in light of the other sections of the bill, and note what the committee has done in the way of setting up democratic procedures to protect the rank and file of the local unions . . . . [W]e provide democratic guarantees [elsewhere] in the bill . . .." II *Legis. Hist.* 1205. Moreover, this Court has construed almost identical language in section 403, 29 U.S.C. § 483, which preserves "existing rights and remedies . . . with respect to elections prior to the conduct thereof," to authorize Title I suits prior to the beginning of a union election, notwithstanding the Secretary's exclusive jurisdiction to enforce Title IV after an election. *Teamsters Local 82 v. Crowley*, 467 U.S. 526, 541 (1984). Thus, section 306, which is studiously ignored by petitioners' brief, undercuts their argument that Title III prevents respondent from redressing a form of retaliation that would otherwise be unlawful under Title I.

Nor is it completely correct to say that Title III itself provides no relief against improper conduct during the course of a trusteeship. Section 302 forbids trusteeships unless they are both "established *and administered*" for proper purposes (emphasis added), and section 304(c) permits a member to invalidate the trusteeship itself if it "was not established *or maintained*" for proper purposes (emphasis added). Respondent does not argue here that the trusteeship itself should have been invalidated because of any improper actions taken during its course, but the fact that Congress plainly permitted members to contest a trusteeship itself, based on actions taken during its course, surely undercuts petitioners' argument that Title III was intended to bar members from securing the lesser remedy of setting aside specific improper actions of a trustee by invoking the remaining provisions of the LMRDA.



Additionally, despite all of petitioners' arguments about a trustee's need for *carte blanche* to sweep aside all obstructions to his proper purposes, petitioners nowhere explain why a trustee needs to be able to retaliate against elected officers who oppose a dues increase which the trustee believes to be necessary. For that is ultimately what this case is about. The trustee was appointed because the International came to the conclusion that the local was unable to manage its fiscal affairs and to live within its means. The trustee then came to the conclusion that the best way for the local to live within its means was not to reduce expenses, but rather to increase revenues. But even petitioners must concede that the membership retained the right to decide whether the revenues should be increased, section 101(a)(3), and respondent simply expressed his view that, before the membership should entrust the trustee with more of their money, he should demonstrate a willingness to reduce the officers' standard of living.

The members' right not to be coerced into approving a dues increase, *Sertic v. Carpenters*, 423 F.2d 515 (6th Cir. 1970), even during a trusteeship, loses much of its meaning if members know that those who exercise their right to oppose the dues increase publicly will suffer retaliation that would have been forbidden had it been imposed by their own elected officers. And the members' right to vote also loses much of its meaning if the trustee can deprive them of information about the issue on which they are voting. *Blanchard v. Johnson*, 532 F.2d 1074, 1079 (6th Cir. 1976); *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1281-1282 (2d Cir. 1974); *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984). Such lack of information is highly likely if the most knowledgeable members of the union, the officers who have been elected to manage the union, are intimidated into silence.

Had the trusteeship been imposed for the principal purpose

of removing an elected local union officer who had exercised his rights under Title I, the law is clear that the trusteeship itself would have been improper and subject to being overturned. *E.g., UFCW v. UFCW Local 919*, 104 LRRM 2093, 2095 (D. Conn. 1979) (trusteeship may not be imposed to enable national president to remove local officer whom he dislikes because of political disagreements); *Carpenters v. Dale*, 118 LRRM 3160, 3166, 3167 (C.D. Cal. 1985) (trusteeship may not be imposed in order to remove elected officials). Accordingly, it would be contrary to the purposes of Title III to allow a duly appointed trustee to subsequently remove elected union officers for such reasons.[10]

Finally, to the extent that petitioners have tried to draw a dichotomy between membership rights and officers' rights, the trustee's actions against Lynn have suppressed membership rights. First, in making his statements, Lynn was not taking any improper advantage of any special powers with which he had been endowed because he was an officer, *e.g.*, making statements to an employer while sitting on a negotiating committee; rather, he simply stood up at a union meeting, as any other member would have been entitled to do (and did), to express his personal opinions. Second, Lynn's statements were directed toward encouraging the membership to exercise their express statutory right to vote down a dues increase, which would have come out of the members' own pay had it passed. And third, to the extent that the membership expressed any view on the controversy, it seems to have sided

[10]This is especially true if, as some courts have held, a trusteeship which is imposed for mixed motives, some of which are permissible under Title III and some of which are not, withstands attack under Title III. *E.g., IBEW Local 1186 v. Eli*, 307 F. Supp. 495, 506 (D. Haw. 1969). If one improper purpose is not enough to invalidate the trusteeship itself, it is crucial to permit members to invoke Title I to prevent trustees from using their powers to accomplish improper objectives.



with Lynn, because the members voted three times to reject the proposed dues increase, and only after the third vote did the trustee take out his frustrations on Lynn by removing him from office. Pet. App. 34a. The notion that provisions of the LMRDA that were intended to ensure that trusteeships would be used to "restore democratic procedures" actually authorizes an appointed trustee to remove an elected officer for expressing the views of his constituents about a dues increase simply stands Title III on its head.

The Court need not decide whether in some circumstances a trustee may remove an elected officer because of statements by the officer which may interfere with the proper functions of the trustee. *Cf.* 29 C.F.R. § 452.15. Even if there are some circumstances in which elected officers may be removed based on their exercise of Title I rights, the decision below should be affirmed because the purposes of both Titles III and I are best served by protecting the elected officer against removal for having opposed a proposed dues increase which the membership itself chose to reject.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# REPLY

# BRIEF

No. 86-1940

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,

*Petitioners,*

v.

EDWARD LYNN,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

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### ARGUMENT

1. After thirty-one pages of a thirty-seven page brief, respondent, remembering that this Court hears cases and controversies and does not pass on abstract legal questions, turns, for the first time, to what he terms "the narrow question posed by this case." Resp. Br. at 8. But respondent's six-page discussion of that question fails to come to terms with the fact that defines the *limits of this case*: several weeks before he was suspended as a business representative, the nature of Lynn's position was fundamentally altered as a result of the fact that Local 75 was placed under an international union trusteeship.

(a) Prior to the trusteeship, Lynn held a position for a stated term by reason of his election by Local 75's

membership. His duties were defined by the Sheet Metal Workers Constitution. And under that Constitution, the grounds upon which Lynn could be removed from his position were narrowly circumscribed.

All that changed, however, when the International placed the Local under a trusteeship. As we explained in our opening brief, when that occurred the International trustee assumed the "full authority to supervise and direct the affairs of Local Union 75." For so long as the trusteeship lasted, the Local's officials—both those who had been elected and those who had been appointed—served at the pleasure of the trustee; any authority those officials exercised was derived from, and was subordinate to, the trustee's authority; and each official had only such duties as were delegated by the trustee. *See* Pet. Br. at 3, 21-22. That is, of course, what normally occurs—and what Congress anticipated would occur—when an international union places a local union in trusteeship. *See id.* at 15-21.[1]

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[1] Without citation to any authority, respondent asserts that when Professor Cox told Congress in 1958 and 1959 that under a trusteeship, there are "no local officers . . . no elections . . . [and] often no union meetings," *see* Pet. Br. at 17-18, Professor Cox meant to "describ[e] the abuses which Title III was meant to prevent." Resp. Br. at 33.

But Professor Cox's meaning can only be ascertained from the words he used, and that is most assuredly *not what he said.* Rather, Professor Cox stated that such *"suspension of local self-government is usually warranted by the needs of the organization . . .*" and that "the obnoxious element of trusteeship is not their imposition but their duration." Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor and Pub. Welfare, 85th Cong. 2d Sess. 353 (1958); Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor and Pub. Welfare, 86th Cong. 1st Sess. 131 (1959) (emphasis added); *see* Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 846-51 (1960)).

Equally to the point, as we showed in our opening brief, that was the view of the 1959 Congress as well. *See* Pet. Br. at 19-20 & n.7.



(b) Given the change that occurred in Lynn's status and in the status of all of the Local's elected officials once the Local was placed in trusteeship, the fact that Lynn was originally elected is of no more relevance here than that fact would be if the elected position had been previously abolished in a manner consistent with law. Lynn's status as an elected official *came to an end* before he was removed; under the International trusteeship, Lynn and the other officials of Local 75 occupied a status *analytically indistinguishable* from the status of the appointed business agents in *Finnegan v. Leu*, 456 U.S. 431 (1982). And *Finnegan* holds that the removal of such business agents does not violate Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411-15 ("LMRDA"). Thus, respondent's repeated refrain that LMRDA Title III is not intended to "prevent [members] from redressing a form of retaliation that would otherwise be unlawful under Title I," Resp. Br. at 34, or "to bar members from . . . setting aside specific improper actions of a trustee," *id.*, misses the point completely.[2]

(c) Failing in his effort to distinguish *Finnegan* based on the manner in which Lynn originally assumed his position, respondent is reduced to arguing that an International trustee somehow has less authority to remove persons who serve at his pleasure than does a newly-elected union president. Respondent attempts to wrest that theory

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[2] That argument is, moreover, wrong in its own terms. Title III on its face does privilege some conduct which otherwise would violate Title I (and Title IV) of the LMRDA. Under LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1), "every member of a labor organization shall have equal rights and privileges within such organization . . . to vote in elections or referendum of the labor organization . . ." But LMRDA § 303(a), 29 U.S.C. § 463(a), expressly permits a union to preclude members of a trusteed local from voting for the election of officers. Similarly, LMRDA § 401(b), 29 U.S.C. § 481(b), requires every local union to elect its officers at three-year intervals; as the Department of Labor has recognized by regulation, that requirement is "suspend[ed]" when a local is placed under a trusteeship under Title III. *See* 29 C.F.R. § 452.15.

from the fact that in *Finnegan* this Court recognized that permitting a newly-elected president to appoint policy-making officials of his choosing "is an integral part of ensuring a union administration's responsiveness to the mandate of the union election," 456 U.S. at 441, and thus furthers the aims of the LMRDA. *See* Resp. Br. at 13, 18-19.

What Lynn fails to comprehend is that the Act has several aims and that permitting an international trustee to select subordinate officials who are loyal to the trustee and can be counted on to effectuate the trustee's policies equally advances the policies of the Act, specifically the policies embodied in Title III. As we showed in our opening brief, that Title rests on the premise that trusteeships are "perhaps the primary device by which international officers can keep the labor movement strong and effective," that "[t]he initial suspension of local self-government is usually warranted by the needs of the organization," and that the law should not therefore "interfere with the necessary and fully legitimate use of trusteeships" or "prevent international intervention when fully justified." Pet. Br. at 16, 20, 19, *quoting* S. Rep. 187, 86th Cong. 1st Sess. 17-18 (1959); S. Rep. 1684, 85th Cong. 2d Sess. 9-10 (1958).

It is thus simply inconceivable that Congress intended to permit internationals to suspend local autonomy completely, but at the same time intended to saddle international trustees with local officials who excoriate the trustee personally or savage the trustee's policies if those officials happened originally to have been elected to their posts. During a lawful trusteeship, whether a local official originally was elected or appointed to his position is of no moment. And whatever merit there may be in *other* contexts in distinguishing between elected and appointed officials for purposes of establishing limits on the power to suspend or remove—an issue we address below—such a distinction makes no sense in the trusteeship context.



2. There is, thus, no occasion in this case for the Court to go beyond the trusteeship context and to reach for the broader question of whether the LMRDA limits the authority of unions to provide for the impeachment or recall of elected officials based on the officials' expressive activity. Indeed, in the most basic sense, such a question is purely hypothetical in this case for strictly as a matter of the Sheet Metal Workers' Constitution, had Local 75 not been under a trusteeship Lynn could not have been removed from office for his statements at the union meeting.

Nonetheless, respondent devotes the bulk of his brief attempting to show that but for the trusteeship Lynn's removal from office would have been unlawful. We therefore venture a brief response so that respondent's arguments do not go unrebutted.

(a) At the threshold, it is important to note that, contrary to respondent's assertion, *see* Resp. Br. at 23-24, the position to which Lynn was elected is *not* a union "office" within the meaning of the LMRDA. "Office" and "officer" are terms of art under that Act; § 2(n) of the Act, 29 U.S.C. § 401(n), defines "officer" to mean

> any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer or other executive functions of a labor organization, and any member of its executive board or similar governing body.

Under the Sheet Metal Workers Constitution the position of "business representative" is not defined as a constitutional "office." [3] Nor, under that Constitution, are

[3] Article XII, § 1 of the Constitution states that "[t]he officers of each local union shall be a president, vice president, recording secretary, financial secretary-treasurer, conductor, warden, the members of the local union executive board, and at least three trustees." J.A. 44. Article XII, § 2 states that "Each local union shall have one (1) business manager and may have additional business representatives . . ." J.A. 45.

business representatives, where the position exists, vested with any "executive function" as that phrase has been authoritatively construed by the Department of Labor. Rather, because such representatives work under the "direct[ion]" of the business manager in performing a variety of functions relating to collective bargaining and contract administration, *see* Art. XII, § 8, J.A. 50, they fall squarely within a regulation promulgated by the Department of Labor which states that the functions of subordinate business representatives—as distinguished from a "business manager" (or "*directing* business agent")—"are not 'other executive functions'" within the meaning of the LMRDA. 29 C.F.R. § 452.19.[4]

Thus, Lynn was not an "officer" under the Act; there is no statutory requirement that his position be filled by election (since LMRDA § 401(b), 29 U.S.C. § 481(b) requires only that "officers" be elected); and Lynn did not have a statutory right to hold that position. The fact that Lynn happened to have been elected rather than appointed is purely a function of a choice made by the International, and not attributable in any way to the LMRDA.

(b) Nor is it true, as respondent contends, that if a union constitution (unlike the Sheet Metal Workers Constitution) were to permit the removal of a business representative such as Lynn from his position while the representative is serving the term for which he was elected

[4] 29 C.F.R. § 452.19 provides in pertinent part as follows:

> The normal functions performed by business agents and shop stewards, such as soliciting memberships, presenting or negotiating employee grievances within the work place, and negotiating contracts are not "other executive functions" as that phrased is used in section 3(n) of the Act. However, a directing business representative or a business manager usually exercises such a degree of executive authority as to be considered an officer, and, therefore, must be elected.



based on the representative's expressive activity, that permission would have "serious consequences both for the rights of union members and, more important, for the system of union democracy." Resp. Br. at 20.

(i) Contrary to respondent's suppositions, Lynn was *not* elected to a position in a quasi-legislative, "representative bod[y]" in which Lynn was "committed to representing the point of view of his constituency." Resp. Br. at 24, 26. Rather, Lynn was elected to a position within the "executive branch" of the local union government. Moreover, Lynn was elected to an *inferior* post within that branch in which his duties were essentially administrative rather than executive in nature, and in which he was *subordinate* to the business manager who was elected by the very same constituency which elected Lynn.

That being so, the "system of union democracy" to which respondent repeatedly appeals, *see* Resp. Br. at 20, 24, 29, would most assuredly *not* be threatened in any way if, for example, Lynn were removable by his superior officer who was elected by the same constituency.[5] As the structure of the Federal Government shows, there is ample room in the theory of democracy to recognize an element of hierarchy in the executive and to grant the chief executive the right to insist on subordinates who loyally carry out properly adopted policies. And "unions, too, have an interest in efficiency and orderly management," as then-Judge Kennedy observed in his dissenting opinion below. Pet. App. 27a.

More generally, given the variety of union structures and methods of governance, it simply cannot be said, *a priori*, that "the system of union democracy," requires that once an official is elected for a term the official must

[5] *A fortiori*, the "system of union democracy" would not be threatened if the constituency which elected Lynn were empowered to recall him, during his term, for his expressive activity.

(absent misconduct) be accorded an absolute right to serve out that term. Nor can it be said that a union constitution which allows for the removal of an elected official for expressive activity necessarily disserves democratic values. At the very least such judgments must depend upon the nature of the position involved, the manner in which the removal is effected, and the manner in which the vacancy resulting from the removal is filled.[6]

(ii) Respondent alternatively argues that removals of elected officials for expressive activity must be treated as *per se* violations of Title I because such removals "will have the effect of discouraging that officer and other members from exercising their free speech rights." Resp. Br. at 20. But after expounding on this point for several pages, *see id.* at 20-23, respondent ultimately concedes, with much understatement, that

> The chilling effect on the rights of individual members caused by a removal from elective union office

[6] Indeed, if it were appropriate here to attempt to derive a *per se* rule from such a broad slogan as "the system of union democracy," we suggest that the proper rule would be precisely the converse of the rule respondent advocates. "Union democracy," in its usual sense, surely encompasses the freedom of union members to decide for themselves, through democratic processes, how to structure the governance of their union, and thus to establish rules governing the impeachment or recall of elected officials. There is no reason to believe that union democracy is furthered by empowering the courts to trump decisions made by union members as to how to structure their unions, and to straitjacket all unions with a system in which elected officials are immunized from recall or impeachment for the views those officials express—on the judiciary's own views of "union democracy." *See also* Pet. App. 27a (Kennedy, J., dissenting) ("The hesitancy of federal courts to attempt resolution of internal disputes between union officials does not evidence unfaithfulness to the LMRDA's goal of ensuring that unions have democratic governance. Rather, it reflects an understanding that, absent a serious threat to the union's basic democratic structure, 'the ultimate power of decision' in such disputes is vested in the voting membership of the union who have the ability to defeat officers abusing or misusing the power.").



> is not dissimilar, of course, to the effect of loss of a union appointment which was at issue in *Finnegan*. [*Id.* at 23.]

Indeed, it would seem to us that any "chilling effect" that may flow from a removal would depend on the position and prominence of the individual removed rather than on the manner by which that individual originally assumed office; thus, for example, we would assume that the removal of fifteen business agents in *Finnegan* was, if anything, far more "chilling" than the removal of one business representative in this case. In all events, potential "chilling effect[s]" provide no basis for treating removals of elected officials *as a class* differently than removals of appointed officials *as a class*.[7]

(c) To this point we have indulged in respondent's assumption that this case is appropriately decided by looking only to the "broad remedial purposes" of the LMRDA, Resp. Br. at 12, and fashioning a rule that "balance[s] completing democratic rights," *id.* at 8; we have shown that even on their own terms, respondent's arguments do not support the *per se* prohibition on removals of elected officials which respondent champions. Our analysis would be incomplete, however, if we did not at least briefly note the fundamental fallacy underlying respondent's approach.

[7] It is also worthy of note that respondent's arguments for distinguishing the removal of elected officials from the removal of appointed officials have no force in the context of trusteeships. Whatever chilling effect might result from a removal during a trusteeship would last only so long as the trusteeship lasted, during which time democratic self-government is in any event suspended, and the chilling effect would end when the trusteeship ended and democratic self-government restored. Similarly, the removal of an elected official during a trusteeship cannot interfere with the function of representative democracy in the union since locals under trusteeship are emphatically not run through a representative form of government. Thus, respondent's arguments ultimately highlight the fact that removals that occur during a trusteeship are a breed apart from other types of removals.

This is a *statutory* case; and it is a case which arises under an Act whose language and legislative history, as this Court has observed, show "that it was rank-and-file union members—not union officers or employees, as such —whom Congress sought to protect." *Finnegan*, 456 U.S. at 431. Yet respondent is attempting to use that Act to create "a system of job security or tenure" for elected union officials, *id.*, by challenging an action which "does not impinge upon the incidents of union membership and affects union members only to the extent that they happen also to be union employees," *id.*

Respondent argues that, notwithstanding *Finnegan*, "the attempt to discern whether 'membership rights' are affected in each case is a fundamentally misguided approach." Resp. Br. at 14. In an effort to prove that point, respondent poses a series of crude hypotheticals in which a rank-and-file member is "beaten or deprived of a job . . . for having expressed views about union leaders at a union meeting," *see* Resp. Br. at 15-16. But in each of those cases, the victim of the retaliatory action, by hypothesis, occupies only *one* status, that of union member, and thus the retaliation is necessarily for the individual's conduct *as a member*. It is therefore easy to conclude that such retaliatory action is simply designed to interfere with the exercise by the individual of his basic membership rights and is contrary to Title I; the courts have uniformly so concluded.

In cases involving the removal of a union official or employee, however, the plaintiffs "h[o]ld a dual status as both employees and members of the Union," *Finnegan*, 456 U.S. at 431, and that being so, it is not necessarily true that the removal resulted from member activity. In this case, for example, Lynn was suspended as a business representative during the term of the trusteeship because he intentionally opposed the program his superior official, the trustee, had directed Lynn to carry out. To treat his removal from a union position in these circumstances as



retaliation for membership activity (rather than as an attempt to regulate a union official's conduct *qua* official) would extend to union officials "immuni[ty] from discharge," *id.*, and would create a "system of job security or tenure," *id.*, that protects insubordinate conduct on the part of subordinate officials.

Thus, as then-Judge Kennedy concluded in his dissenting opinion below, *Finnegan* is best read as drawing a "key distinction . . . between an infringement on rights in the complainant's capacity as a union member and the termination of his privilege to act as a union officer," and as holding that at least "[a]bsent a serious threat to the continued democratic governance of the union," an action of the latter sort, which affects an individual *solely* "in his capacity as an officer . . . does not violate the rights of union membership protected by the LMRDA." Pet. App. 24a-25a.

## CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the district court's judgment of dismissal reinstated.

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